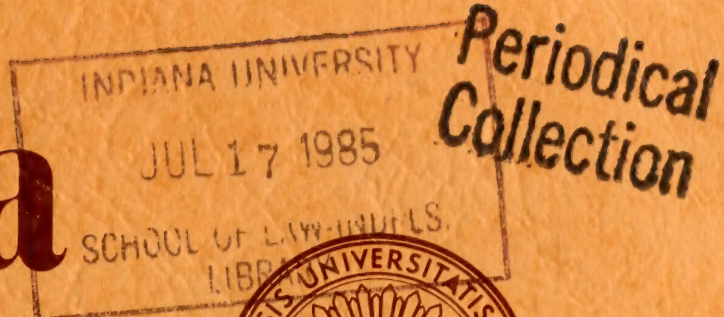


Indiana Law Review



Volume 18 No. 1 1985

1984 Survey of Recent Developments in Indiana Law

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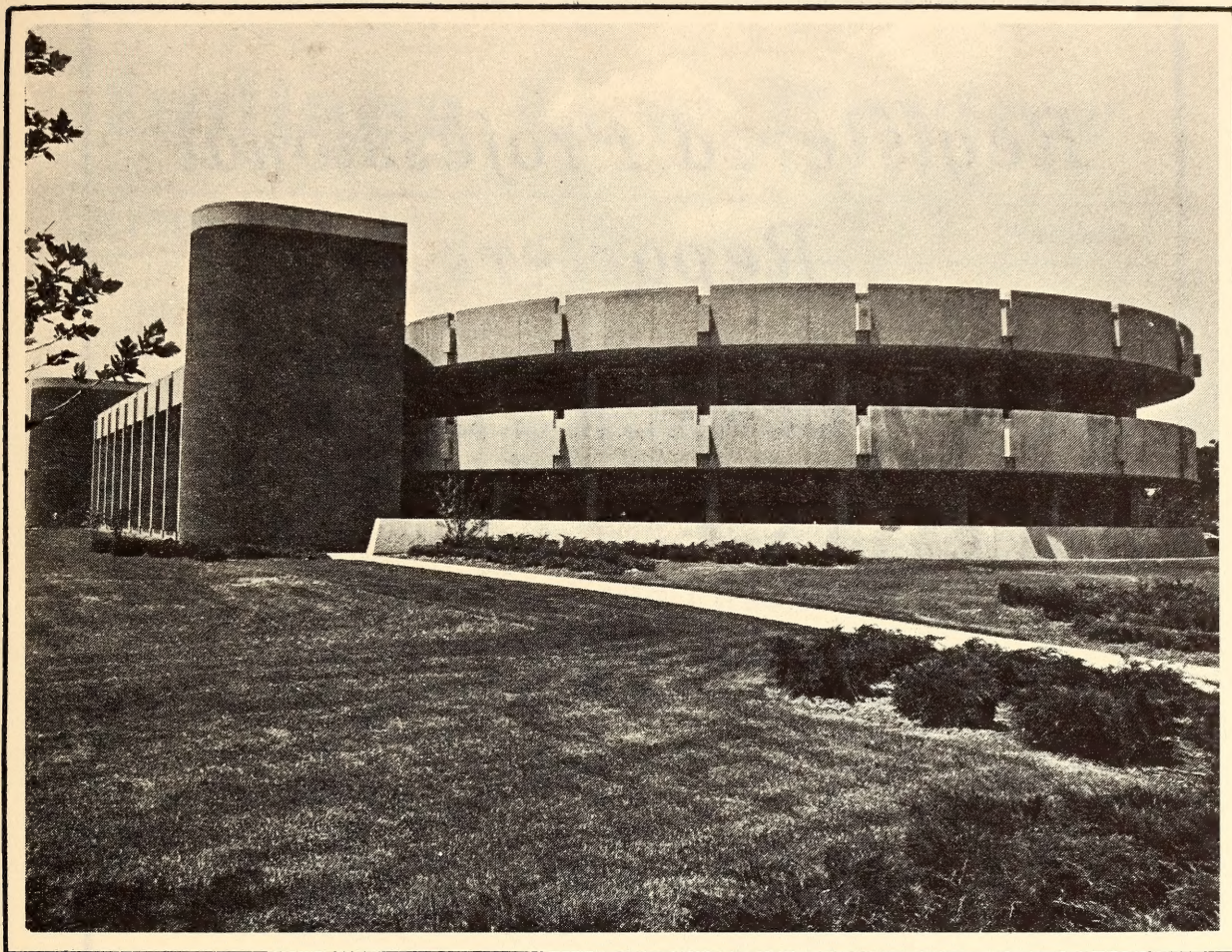
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The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility therefore. Subscription rates: one year \$15.00; foreign \$18.50. Back issues are available from Fred B. Rothman & Co., 10368 W. Centennial Rd., Littleton, Co. 80127. Please notify us one month in advance of any change of address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law—Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, 735 West New York Street, Indianapolis, Indiana 46202.

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Indiana Law Review

Volume 18

1985

Number 1

Indiana and the World: International Business Law Foreword

LEE H. HAMILTON*

With this issue, the *Indiana Law Review* sets its sights on a goal important to Hoosier farmers, laborers, business people, lawyers, and citizens at large: bringing International Business Law to the forefront of Indiana law. The Indiana University School of Law at Indianapolis has expanded its international law program exponentially in recent years. Today, law students may receive extensive training in international law, while veteran attorneys may refresh their knowledge or delve into international law for the first time.

While it is no doubt important for lawyers themselves to become experts in international law, the ability to make practical use of such expertise is the most important goal of all. The international marketplace is crucial to the Indiana economy. And thus, all Hoosiers will benefit as our state takes an aggressive presence in the international marketplace. This is not, however, only a vision for the future.

Even now the economy of Indiana is internationalized. More than 90,000 Indiana manufacturing jobs depend upon exports.¹ Among the fifty states, Indiana manufactures over \$9 billion worth of export-related shipments annually, making it the ninth largest exporter of manufactured products.² In addition, Indiana ranks eighth among the states in the export of agricultural products,³ producing more than \$1.7 billion in agricultural exports.

Indiana must not, however, rest on these laurels. As the international marketplace becomes more important, Indiana attorneys must, corre-

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¹Indiana Department of Commerce, *A World of Profit What Exports Mean to Indiana and Your City* (1983) (available from the Indiana Department of Commerce, Indianapolis, Indiana).

²*Id.*

³*Id.*

spondingly, become more adept in international transactions. Sound legal knowledge will serve to spark further growth of Indiana interests in the international marketplace. Strenuous efforts are already underway to encourage more small and intermediate Indiana companies to export. By the United States Department of Commerce's estimates, more than two thousand Indiana companies could profitably export.⁴ Such potential should not be neglected.

This Survey of International Business Law will be an important feature of the *Indiana Law Review's* Survey of Recent Developments in Indiana Law. This Article covers many aspects of international business and offers an easy introduction to the field. The Article demonstrates that international business law is varied, complex, interesting, and potentially vital to the Indiana practitioner. And as the practitioner's expertise increases, so will Indiana's economic position in the nation and the world increase.

⁴Interview with Phillip Grebe, Director of the International Trade Division, Indiana Department of Commerce, in Indianapolis (Jan. 26, 1984).

Indiana and the World: International Business Law

D. ROBERT WEBSTER**

GREGORY BOWES***

A. Developments In Indiana

1. *Indiana Case Law.*—The only significant Indiana case with international implications during 1983 was *Skrundz v. Review Board of the Indiana Employment Security*.⁵ A group of seventy-one maintenance workers employed by Inland Steel Company in East Chicago lost their jobs in a carbon steel factory. Carbon steel workers were certified as workers affected by foreign competition under the Trade Act of 1974.⁶ The purpose of this certification is to enable workers, discharged because of the effects of foreign competition, to receive a trade readjustment allowance (TRA) under the Act.⁷ In this particular case, the carbon steelworkers were laid off during the certification process.

Some of the group's members were dissuaded by United States government representatives from applying for TRA's. These representatives argued that the workers were ineligible because they were maintenance workers and not directly involved in production. After the expiration of the two year certification period, and after the TRA Review Board denied all retroactive claims for TRA, each worker filed a written application for a TRA.⁸ In proceedings before a referee, it was discovered that some workers filed late because the Review Board told them they were ineligible. Yet no evidence was discovered that the Review Board did not permit those workers to file.⁹

Several important issues were raised: first, whether the Review Board had breached the Act by discouraging application and establishing non-retroactive restrictions; second, whether maintenance workers were covered under the Act; and third, whether the agency charged with the responsibility to administer the Act should have assisted the affected workers.¹⁰

The Indiana Court of Appeals held that the agency did not violate

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⁵444 N.E.2d 1217 (Ind. Ct. App. 1983).

⁶19 U.S.C. § 2271 (1982).

⁷444 N.E.2d at 1225.

⁸*Id.* at 1219.

⁹*Id.* at 1220.

¹⁰*Id.*

the Act by dissuading workers from applying, nor by its failure to provide assistance.¹¹ Rather, the agency violated the Act when it limited the time for filing.¹² As a result, the case was reversed and remanded.¹³

The court reasoned that there was no duty to assist the workers when the agency believed they were ineligible.¹⁴ By placing time limits for filing a claim however, the agency had misconstrued the Act. Moreover, it was determined unimportant whether or not the maintenance workers were expressly members of the group of employees the carbon steel industry union sought to protect.¹⁵ The purpose of the Trade Act of 1974, the court determined, was to give greater protection than provided under unemployment compensation in the event of harmful effects occasioned by foreign competition.¹⁶ Therefore, the agency should not restrict coverage to only those workers who were directly affected.¹⁷

Skrundz is significant because of the manner in which the court chose to interpret the Trade Act of 1974. Rather than opting for a technical construction, it chose to construe the Act to realize the purposes of its framers, providing compensation to workers affected by foreign competition, either directly in the case of production workers, or indirectly in the case of maintenance workers.

2. *Legislative Update.*—An important development in Indiana affecting international trade was the act establishing the Indiana Employment Development Commission (IEDC).¹⁸ In part, this act permits the IEDC, under certain circumstances, to guarantee loans for working to extend loan guarantees for working capital if it determines that such a loan “is for an industrial development project or agricultural or mining operations . . . and . . . will lead directly to increased production and job creation through . . . exports to foreign markets.”¹⁹ Loan guarantees permitted under this statute are nonrenewable, limited to \$500,000 per guarantee for any single project, and may not exceed eighteen months.²⁰

¹¹*Id.* at 1221.

¹²*Id.* at 1223.

¹³*Id.* at 1227.

¹⁴*Id.* at 1221.

¹⁵*Id.* at 1226.

¹⁶*Id.* at 1225.

¹⁷*Id.* at 1226.

¹⁸Act of Apr. 19, 1983, Pub. L. No. 24-1983, Sec. 4, 1983 Ind. Acts 287 (codified at IND. CODE §§ 4-4-11-2, -3, -15, -16 (Supp. 1984)).

¹⁹IND. CODE § 4-4-11-16(c)(1),(2) (Supp. 1984). The IEDC was established for the “public purpose of promoting opportunities for gainful employment and business opportunities by the promotion and development of industrial development projects, mining operations, and agricultural operations that involve the processing of agricultural products, in any areas of the state.” IND. CODE § 4-4-11-2(b) (Supp. 1984).

²⁰*Id.* § 4-4-11-16(c)(1).

B. National Developments

The year 1983 promised to be the year of trade. It was not. As the 98th Congress began its deliberations, many expected that a strong domestic content bill would be enacted. The House of Representatives passed such a bill in a form stronger than originally drafted,²¹ but the Senate showed no inclination to follow. With minimal funding, adjustment assistance for workers displaced by imports was extended for two years and a watered-down version of the Caribbean Basin Initiative was enacted.²² There were, however, substantial developments in the federal courts.

1. *Decisions of the United States Supreme Court.*—A case of particular significance to state taxing authorities decided during the survey period was *Container Corp. of America v. Franchise Tax Board*.²³ California imposed a corporate franchise tax based upon the apportionment of a corporation's total income arrived at by applying a "unitary business" formula.²⁴ During the years in question, Container filed its return omitting the payroll, property, and sales figures of its foreign (international) subsidiaries. After conducting an audit, California assessed additional taxes for the income from the omitted items.²⁵ Container paid the taxes under protest and filed for a refund.²⁶ The additional assessments were upheld at the trial and appellate levels; subsequently, Container sought review by the United States Supreme Court.²⁷

Several issues were before the Court: whether it was improper for California to treat a domestic corporation and its foreign subsidiaries as a unitary business for state income tax purposes;²⁸ whether California's three factor formula met the "constitutional requirement of 'fair apportionment'",²⁹ and, whether California violated the Foreign Commerce Clause of the Constitution by its failure to utilize an "arm's-length" analysis employed by other governments in "evaluating the tax consequences of inter-corporate relationships."³⁰

²¹H.R. 1234, 98th Cong., 1st Sess. (1983).

²²Act of Aug. 5, 1983, Pub. L. No. 98-67, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 369-98.

²³103 S. Ct. 2933 (1983), *reh'g denied*, 104 S. Ct. 265 (1983). For an extensive discussion of this case, see Stuart & Williams, *Constitutional Considerations of State Taxation of Multinational Corporate Income: Before and After Container Corporation of America v. Franchise Tax Board*, 16 IND. L. REV. 783 (1983).

²⁴103 S. Ct. at 2939.

²⁵*Id.* at 2944.

²⁶*Id.* at 2945.

²⁷*Id.*

²⁸*Id.* at 2939.

²⁹*Id.*

³⁰*Id.* See U.S. CONST. art. I, § 8, cl. 3. Under the arm's-length approach, every corporation, even if closely tied to other corporations, is treated for most—but decidedly

The Court noted that the constitutionality of the "unitary business" formula, subject to some constraints, has been upheld in many cases. Furthermore, in a case such as this, the petitioner has the burden of proving that the state used either the wrong standards for the test or clearly taxed values not within the state's domain.³¹

California successfully demonstrated to the Court that the California parent was involved in the activities of the subsidiary, including the making of loans, loan guarantees, marketing activities, and personnel decisions for subsidiaries. Therefore, California argued, the state had taxed values clearly within its domain.³² The Court reasoned that the formula employed in this case did not materially differ from other methods that had withstood constitutional challenge.³³ Thus, the three factor formula employed by California was constitutional.³⁴

The Court also found that the State of California did not violate the foreign commerce clause of the United States Constitution.³⁵ Noting that the commerce clause requires that whatever tax system is adopted, it "must not result in double taxation,"³⁶ the Court held that California's tax was not a double tax.³⁷

Over the years, courts have adopted a "one voice" standard in interpreting the foreign commerce clause.³⁸ This standard reflects the concern that "a state tax [might] 'impair federal uniformity in an area where federal uniformity is essential,' "³⁹ and ensures that the states are not making foreign policy which could affect the foreign policy of the United States government. The Court reasoned that the tax in question would not significantly affect foreign policy since the "legal incidence of the tax" fell only on a domestic corporation and did not create an "automatic 'asymmetry'" in international taxation.⁴⁰ Even if foreign governments had an interest in lowering the tax burdens of domestic corporations, the Court noted that California could tax them in some other form or at higher rates.⁴¹

not all—purposes as if it were an independent entity dealing at arm's length with the jurisdictions in which it operates and only for the income it realizes on its own books. 103 S. Ct. at 2950.

³¹103 S. Ct. at 2945.

³²*Id.* at 2947.

³³*Id.* at 2950.

³⁴Container Corp. could only demonstrate a 14% difference in California's method and the method it utilized. *Id.*

³⁵*Id.* at 2950-57.

³⁶*Id.* at 2955.

³⁷*Id.* at 2954.

³⁸*Id.* at 2951.

³⁹*Id.* (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979)).

⁴⁰*Id.* at 2955, 2956 (emphasis omitted).

⁴¹The Court also found that the tax was not preempted by federal law because no treaties contemplated state taxes, Congress had not enacted contrary legislation, and federal tax statutes did not preempt the field. *Id.* at 2955-57.

Another case involving state taxation was *Westinghouse Electric Corp. v. Tully*.⁴² In that case, Westinghouse argued that New York's taxation scheme for Domestic Sales International Corporations (DISC's) was discriminatory and in violation of the commerce clause⁴³ of the Constitution.⁴⁴

The Revenue Act of 1971,⁴⁵ amending the Internal Revenue Code of 1954,⁴⁶ provided tax incentives to U.S. firms to export goods to other countries.⁴⁷ A firm qualifying for DISC status could remove fifty percent of its tax liability and defer its remaining liability. The first half of a DISC's net income, whether actually distributed or not, was to be treated as if it had been distributed to shareholders.⁴⁸ The tax on the remaining fifty percent was deferred until actually distributed, or until the firm no longer qualified as a DISC.⁴⁹

The New York legislature enacted a law taxing the parent corporations of subsidiaries qualifying as DISC's.⁵⁰ This provision was made in response to a finding that if New York did not tax these corporations, the state would suffer annual revenue losses of \$20-30 million.⁵¹ To encourage business activity in New York, the law provided for an offsetting tax credit of thirty percent of a DISC's income.⁵² The computation of the credit resulted in the allowance of a credit for DISC income derived from business done in New York but not for DISC income derived from other states.⁵³

The Court found this credit scheme in violation of the commerce clause.⁵⁴ It explained that this tax credit discriminated in favor of New York businesses and, therefore, "forecloses tax-neutral decisions."⁵⁵ The Court offered examples which compared the tax liability of DISC's doing more business from New York with those doing less, finding discriminatory treatment in all cases.⁵⁶

⁴²104 S. Ct. 1856 (1984).

⁴³U.S. CONST. art. I, § 8, cl. 3.

⁴⁴*Westinghouse*, 104 S. Ct. at 1861.

⁴⁵26 U.S.C. § 1-7801 (1982).

⁴⁶26 U.S.C. § 501-5-7 (1982).

⁴⁷*Westinghouse*, 104 S. Ct. at 1858.

⁴⁸*Id.* at 1859.

⁴⁹*Id.*

⁵⁰*Id.* at 1859-60. The budget analyst also cautioned "that state taxation of DISCs would discourage their formation in New York and also discourage the manufacture of export goods within the State." *Id.* at 1860 (citation omitted).

⁵¹*Id.* at 1860.

⁵²*Id.*

⁵³*Id.* at 1863-65.

⁵⁴*Id.* at 1868.

⁵⁵*Id.* at 1867 (quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 331 (1977)).

⁵⁶*Id.* at 1863 n.9.

In *Verlinden B.V. v. Central Bank of Nigeria*,⁵⁷ the United States Supreme Court held that under the jurisdiction provision of the Foreign Sovereign Immunities Act of 1976,⁵⁸ a federal court has both personal and subject matter jurisdiction in civil actions by foreign plaintiffs against foreign sovereigns under the appropriate circumstances. The plaintiff, a Dutch corporation, entered into a contract for the purchase of cement with the Federal Republic of Nigeria. The contract required payment for the cement to be made through a confirmed letter of credit issued by Morgan Guaranty Trust Company. An instrumentality of Nigeria, the Central Bank of Nigeria was responsible for obtaining the letter of credit, yet the defendant improperly established an unconfirmed letter of credit.⁵⁹ Subsequently, the plaintiff brought an action for anticipatory breach of the letter of credit.⁶⁰

Upon the defendant's motion to dismiss, the district court held that it had subject matter jurisdiction over the case under the Foreign Sovereign Immunities Act of 1976, but dismissed the case because of a lack of personal jurisdiction.⁶¹ The Second Circuit Court of Appeals affirmed the district court's dismissal but on different grounds.⁶² It held that "neither the Diversity Clause nor the 'Arising Under' Clause of Art. III [of the United States Constitution] is broad enough to support jurisdiction over actions by foreign plaintiffs against foreign sovereigns . . . ,"⁶³ concluding that Congress was without power to grant jurisdiction in this case.⁶⁴

The United States Supreme Court reversed, holding that the scope of article III of the Constitution was not exceeded by permitting a foreign plaintiff to sue a foreign sovereign in a United States federal court because the "arising under" clause empowered the courts to exercise subject matter jurisdiction in such situations.⁶⁵ Congress can decide "whether and under what circumstances" a foreign nation will be amenable to suit in the courts of the United States by reason of its authority over foreign commerce and foreign relations.⁶⁶ Thus, the Court noted, the Foreign Sovereign Immunities Act was not only a jurisdictional statute but a substantive law, as the Act was an exercise of the congres-

⁵⁷461 U.S. 480 (1983).

⁵⁸461 U.S. at 486-92. See 28 U.S.C. § 1330 (1982).

⁵⁹461 U.S. at 482.

⁶⁰*Id.* at 483.

⁶¹*Id.* at 485 n.5. See 28 U.S.C. § 1330 (1982).

⁶²647 F.2d 320 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983).

⁶³461 U.S. at 485 (footnotes omitted).

⁶⁴*Id.*

⁶⁵*Id.* at 492.

⁶⁶*Id.* at 493 (citations omitted).

sional power to regulate foreign commerce.⁶⁷ Reviewing the Act's legislative history, the Court concluded that Congress did not intend to limit jurisdiction under the Act to actions brought by American citizens.⁶⁸

Another important international law case decided by the United States Supreme Court during the 1983-84 term was *First National City Bank v. Banco Para El Comercio Exterior De Cuba*.⁶⁹ First National City Bank (now Citibank) issued a letter of credit for a Canadian sugar importer in favor of the respondent (Bancec). Bancec assigned the letter of credit to Cuba's central bank.⁷⁰ The sugar was delivered and the Cuban National Bank applied to Citibank for payment. Not long thereafter, Cuba nationalized all of Citibank's assets in Cuba.⁷¹ Bancec brought a diversity action to recover on the letter of credit. In its answer, Citibank sought to setoff the expropriated funds against the amount of the letter of credit.⁷²

After it filed the lawsuit, Bancec was dissolved by Cuba and its assets were transferred to various branches of the Ministry of Foreign Trade including the Cuban National Bank.⁷³ Bancec argued that its claim was being brought in its capacity as an independent juridical entity. And as a result, it asserted, it was not responsible for the acts of the Cuban government.⁷⁴ Citibank counterclaimed, arguing that Bancec was an instrumentality of the Cuban government and therefore Citibank was entitled to a setoff.⁷⁵

The district court concluded that Bancec was an alter ego of the Cuban government, dismissed Bancec's claim, and permitted Citibank to exercise a setoff.⁷⁶ The Second Circuit Court of Appeals reversed, finding that Bancec was not an alter ego of the Cuban government.⁷⁷

The questions brought before the United States Supreme Court included which body of law should control in determining whether a party is a juridical entity separate from a foreign government; whether Bancec was a separate juridical entity in this case; and, whether Citibank

⁶⁷*Id.* at 496-97. "The Act . . . does not merely concern access to the federal courts. . . . The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law" *Id.* (citations omitted).

⁶⁸*Id.* at 489-90.

⁶⁹103 S. Ct. 2591 (1983).

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 2594.

⁷⁴*Id.* at 2595.

⁷⁵*Id.* at 2596.

⁷⁶*Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412 (S.D.N.Y. 1980), *rev'd*, *Banco Para el Comercio Exterior de Cuba v. First National City Bank*, 658 F.2d 913 (2d Cir. 1981), *rev'd*, 462 U.S. 611 (1983).

⁷⁷658 F.2d. 913 (2d Cir. 1981), *rev'd*, 462 U.S. 611 (1983).

could assert a setoff against a foreign government which brought suit in the courts of the United States.⁷⁸

The Court applied principles of both international law and federal common law in deciding whether a party is a separate juridical entity.⁷⁹ The Court observed that giving conclusive effect to the laws of the chartering state to determine the status of its instrumentalities would "permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts."⁸⁰ Neither international law nor federal law allows a foreign government to file a claim yet be immune from counterclaim.⁸¹ As to *Bancec*, the Supreme Court specifically held that it could not be treated as a separate entity:

Giving effect to *Bancec*'s separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets—a seizure previously held by the Court of Appeals to have violated international law. We decline to adhere blindly to the corporate form where doing so would cause such an injustice.⁸²

Justice Stevens, in a separate opinion, concurred in the result as far as permitting a United States citizen to bring a counterclaim against a foreign government. He dissented, however, on the ground that it was not clear from the facts that *Bancec* actually was not a separate entity.⁸³

The United States Supreme Court further outlined the "minimum contacts" requirements for in personam jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.⁸⁴ That case involved a wrongful death action brought in Texas against a Columbian corporation. *Helicopteros* had contracted with a pipeline joint venture to provide transportation of equipment and employees to pipeline sites in Peru.⁸⁵ This wrongful death suit was initiated after a helicopter owned by *Helicopteros* crashed in Peru, resulting in the deaths of four American employees of the joint venture.⁸⁶

⁷⁸103 S. Ct. at 2591.

⁷⁹*Id.* at 2598.

⁸⁰*Id.* at 2597 (footnote omitted).

⁸¹*Id.* at 2602.

⁸²*Id.* at 2603 (footnote & citations omitted).

⁸³*Id.* at 2604 (Justice Stevens would have remanded the case for more evidence on that issue.)

⁸⁴104 S. Ct. 1868 (1984).

⁸⁵*Id.* at 1870.

⁸⁶*Id.*

The Texas court based its jurisdiction on the fact that Helicopteros sent its chief executive officer to Houston to negotiate the contract, purchased approximately eighty percent of its fleet of helicopters in Fort Worth, sent several employees to the manufacturer in Fort Worth for orientation and training, and accepted into its New York and Florida bank accounts checks drawn on a Houston bank.⁸⁷

The United States Supreme Court, reversing the Supreme Court of Texas, held that these contacts were insufficient to give Texas jurisdiction over the defendant because they did not satisfy the requirements of the due process clause of the fourteenth amendment.⁸⁸ The United States Supreme Court relied on *Rosenburg Brothers & Co. v. Curtis Brown Co.*⁸⁹ which stated, “Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction”⁹⁰ The Court deemed Helicopteros’ contacts with Texas to be no more significant than those in *Rosenburg*.⁹¹ Perhaps significantly, the Court took notice of the fact that the contract had been executed in Peru and not in Texas.⁹²

2. *Decisions of the Federal Courts of Appeals.*—*a. Antitrust.*—In *Associated-Container Transportation (Australia) Ltd. v. United States*,⁹³ the United States Justice Department issued civil investigative demands (CID’s) to numerous corporations for possible antitrust violations.⁹⁴ Some of the corporations sought an order to set aside portions of the Justice Department’s investigation seeking information relating to particular conversations with the United States Federal Maritime Commission and various governmental agencies of Australia and New Zealand.⁹⁵ The plaintiffs relied on the Noerr-Pennington doctrine⁹⁶ and the act-of-state

⁸⁷*Id.*

⁸⁸*Id.* at 1874.

⁸⁹260 U.S. 516 (1923), *overruled*, *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S. Ct. 1868 (1984).

⁹⁰104 S. Ct. at 1874 (quoting *Rosenburg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923)). *See supra* note 89.

⁹¹104 S. Ct. at 1874.

⁹²*Id.* at 1870.

⁹³705 F.2d 53 (2d Cir. 1983).

⁹⁴These demands were issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 to -14 (1982).

⁹⁵705 F.2d at 56.

⁹⁶*See* *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1965). The *Noerr-Pennington* doctrine grants immunity from the Sherman Act, 15 U.S.C. § 1 (1982), for legitimate efforts to influence public officials even if the purpose is anticompetitive. *Associated-Container* argued that its communications with the Federal Maritime Commission, in an attempt to get approval of certain shipping agreements, were protected from disclosure. 705 F.2d at 59.

doctrine⁹⁷ to argue that the communications were protected from disclosure.

The Second Circuit Court of Appeals determined that the corporations were not facing formal charges, and thus could not rely on the Noerr-Pennington doctrine. Generally, that doctrine protects businesses from prosecution, but not necessarily from investigation.⁹⁸ Accordingly, the court held that at this particular stage of the proceeding, the doctrine did not preclude enforcement of the CID's. Similarly, it determined that the investigation in question would not constitute an inquiry proscribed by the act-of-state doctrine, as it was not an inquiry into the validity of the public acts of a sovereign.⁹⁹ The court of appeals noted that this case did not require it to judge the legitimacy of the actions; rather, the court simply decided that the federal government had demonstrated it had a reason to believe the requested information was relevant. As a result, the act-of-state doctrine did not prevent the court from enforcing the CID's.¹⁰⁰

Another significant case involving antitrust was *In re Japanese Electronic Products Antitrust Litigation*.¹⁰¹ Zenith Radio Corporation and National Union Electronics brought an action against twenty-four Japanese electronics manufacturers and their United States subsidiaries for alleged violations of the Sherman Antitrust Act,¹⁰² the Clayton Act,¹⁰³ the Robinson-Patman Act,¹⁰⁴ and the Wilson Tariff Act.¹⁰⁵

The plaintiffs claimed that the Japanese defendants had conspired to reduce competition in Japan by maintaining price ceilings, and in the

⁹⁷The act-of-state doctrine "preludes the courts of this country from inquiring into the validity of the public acts a recognized sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964), *quoted in Associated-Container*, 705 F.2d at 60.

⁹⁸The court also noted that only until the Antitrust Division of the Justice Department was permitted to exercise its investigative authority could it be determined whether the antitrust laws had even been violated, or whether the *Noerr-Pennington* doctrine immunized the appellees' conduct. 705 F.2d at 60.

⁹⁹*Id.* at 62. The act-of-state doctrine "is a function of our system of separation of powers and as such has 'constitutional underpinnings.'" *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 708 (1984) (citation omitted). The doctrine was first set forth in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.*

¹⁰⁰705 F.2d at 61.

¹⁰¹723 F.2d 238 (3d Cir. 1983).

¹⁰²15 U.S.C. §§ 1, 2 (1982).

¹⁰³15 U.S.C. § 18 (1982).

¹⁰⁴15 U.S.C. § 13(a) (1982).

¹⁰⁵15 U.S.C. § 8 (1982).

United States, by requiring that each alleged conspirator have no more than five American customers.¹⁰⁶ The district court granted summary judgment in favor of the defendants.¹⁰⁷ The Third Circuit Court of Appeals reversed, finding that the district court had excluded significant items of evidence, and that there was sufficient evidence to raise a genuine issue of material fact as to the claims involving the Sherman, Clayton, and Wilson Tariff Acts.¹⁰⁸ The court of appeals affirmed summary judgment as to one of the Robinson-Patman Act claims, as that Act only proscribes price discrimination involving sales for use in the United States.¹⁰⁹ In addition, summary judgment in favor of the Sony Corporation, one of the five Japanese electronic companies, was upheld because there was no evidence that it was part of an agreement to maintain Japanese prices at a high level.¹¹⁰ Summary judgments in favor of Motorola and Sears were also affirmed because there was no legally sufficient evidence establishing anticompetitive behavior.¹¹¹ Finally, the court held that Zenith and National Union Electric were entitled to injunctive relief under the Clayton Act during the pendency of the litigation.¹¹²

b. Antidumping.—Antidumping principles were also at issue in *In re Japanese Electronics Products Antitrust Litigation*.¹¹³ In that case, the plaintiffs maintained that all of the defendants violated the Antidumping Act of 1916¹¹⁴ which in part provides:

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles . . . in the principal markets of the country of their production *Provided*, that such act or acts be done with the intent of destroying or injuring an industry in the United States¹¹⁵

As in the antitrust portion of the case, the lower court granted summary judgment in favor of the defendants after excluding many relevant items

¹⁰⁶723 F.2d at 308-10.

¹⁰⁷*Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190 (E.D. Pa. 1980).

¹⁰⁸723 F.2d 306-10.

¹⁰⁹*Id.* at 316-17.

¹¹⁰*Id.* at 313.

¹¹¹*Id.* at 311-13.

¹¹²*Id.* at 318.

¹¹³723 F.2d 319 (3d Cir. 1983).

¹¹⁴15 U.S.C. § 72 (1982).

¹¹⁵*Id.*

of evidence.¹¹⁶ The court of appeals held that the evidence, which had been erroneously excluded in the antitrust case, was sufficient to raise a genuine issue of material fact as to the dumping claims and reversed.¹¹⁷ Summary judgments in favor of Sony, Motorola, and Sears were affirmed for reasons similar to the rationale in the antitrust cases.¹¹⁸ The court in *In re Japanese*, expressly held that the Treaty of Friendship, Commerce and Navigation¹¹⁹ did not prevent a claim under the Antidumping Act.¹²⁰ This treaty prohibits discrimination between domestic and imported products only in matters “affecting internal taxation, sale, distribution, storage and use.”¹²¹ It does not, however, restrict the United States from its power to regulate imports; and article XIV(4) of the treaty permits either party to impose restrictions on unfair trade practices.¹²²

In addition, the defendants argued that the Antidumping Act was void for vagueness. They alleged that “application of the 1916 Act to products possessing . . . technical differences . . . makes [that] statute unconstitutionally vague.”¹²³ The court rejected the defendants’ vagueness argument, holding the language found in the Act was not so vague as to make it unconstitutional on its face.¹²⁴ It determined that the elements of a violation of the Act were described with the required “reasonable degree of certainty.”¹²⁵ Those elements include: (1) the products must be comparable; (2) the products must be sold at a lower price in the United States than in the country of origin; and, (3) sales must be made with the intent to injure or destroy a United States industry.¹²⁶ The court decided that there was sufficient evidence to establish the existence of the elements referred to in the Act, and to raise a genuine issue of material fact sufficient to reverse a summary judgment.¹²⁷ This case will bear watching in the future as a possible guide for the application of the Antidumping Act against Japanese and other foreign companies.

The Zenith Corporation was involved in another lawsuit in which dumping by Japanese manufacturers of televisions was alleged. In *Zenith Radio Corp. v. United States*,¹²⁸ Zenith sought “a preliminary injunction

¹¹⁶723 F.2d at 328.

¹¹⁷*Id.* at 328-30.

¹¹⁸*Id.*

¹¹⁹Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, art. XVI, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

¹²⁰723 F.2d at 323.

¹²¹*Id.* at 323-24 (quoting article XVI of the treaty).

¹²²*Id.* at 324.

¹²³*Id.* at 326.

¹²⁴*Id.*

¹²⁵*Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952), *quoted in In re Japanese Electronics Products Antitrust Litigation*, 723 F.2d at 326.

¹²⁶723 F.2d at 324, 327.

¹²⁷*Id.*

¹²⁸710 F.2d 806 (D.C. Cir. 1983).

to prevent liquidation of entries of certain television receivers subject to dumping duties.”¹²⁹ The lower court denied Zenith’s request for a preliminary injunction on the sole ground “that Zenith failed to show that it [would] suffer irreparable harm in the absence of an injunction.”¹³⁰

On appeal, the Court of Appeals for the Federal District reversed and remanded. It observed that although the district court was not compelled to issue an injunction, the lower court failed to address other requirements for an injunction, such as the balance of hardships on all the parties, whether or not the public interest would be better served by the injunction, and the likelihood of success on the merits.¹³¹ The court maintained that Zenith had an interest in maintaining its ability to compete in the television industry. It found that the Japanese importers were engaged in dumping activities in the United States market, holding that such activity does have an ill effect on American manufacturers.¹³² Thus, Zenith would have been irreparably harmed if it could not preserve the entries pending litigation of the claim that the annual review was incorrect, since no other relief was available.¹³³

Procedures for assessing dumping duties on Japanese television importers were also at issue in *Committee to Preserve American Color Television v. United States*.¹³⁴ Upon learning that the Secretary of Commerce had reached an agreement with Japanese television importers to compromise claims for dumping duty assessments, the Committee to Preserve American Color Television (COMPACT) sued to enjoin implementation of the compromise.¹³⁵ COMPACT argued that the Secretary of Commerce had no authority to compromise such claims, and even if he did possess such authority, he exercised bad faith in making this particular compromise.

The court noted that at one time, it was the Secretary of the Treasury who had the authority to compromise claims under section 617 of the Tariff Act of 1930.¹³⁶ However, in 1979, that authority was transferred to the Secretary of Commerce.¹³⁷ COMPACT also argued that the Secretary’s recommendations, which underestimated the maximum amount of duties the government could collect, were evidence of his bad faith.

¹²⁹*Id.* at 807. The planned liquidation was the result of an annual review of such duties by the International Trade Administration. Such reviews establish the margins used to determine the following year’s dumping duties. *Id.* at 808.

¹³⁰*Id.* at 807.

¹³¹*Id.* at 809.

¹³²*Id.* at 810-11.

¹³³*Id.* at 811.

¹³⁴706 F.2d 1574 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 96 (1983).

¹³⁵*Id.* at 1576.

¹³⁶19 U.S.C. § 1617 (1982).

¹³⁷Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273, 69,275 (1979), *reprinted in* 93 Stat. 1381 (1979).

Yet the court rejected this argument, and affirmed the lower court decision.¹³⁸

Japanese manufacturers were the subject of yet another dumping suit in *Smith-Corona Group v. United States*.¹³⁹ Smith-Corona challenged the methods of computing certain adjustments to dumping duties imposed on Japanese makers of typewriters. It argued that the methods used were inconsistent with the requirements of the Trade Agreements Act of 1979.¹⁴⁰ Smith-Corona contended that costs should not be used in determining allowances, but that "differences in *price* or *value* must be [the factors that are] due to differences in circumstances of sale."¹⁴¹ In addition, Smith-Corona argued that the "exporter's sales price offset" found in a Department of Commerce regulation was invalid because it contravened the adjustments provided for in the Trade Agreements Act.¹⁴²

Employing a liberal construction to the Trade Agreements Act, the court of appeals recognized in the Secretary of Commerce a "broad discretion in making adjustments,"¹⁴³ and neither the language of the Act nor its legislative history excluded using the cost method to make adjustments.¹⁴⁴ Indeed, the court noted that the cost method might be the most efficient method, in view of statutory requirements for a speedy determination.¹⁴⁵ The court upheld the "exporter's sales price offset" because it merely took into account selling expenses incurred in selling within the United States. As such, it was "a proper and reasonable exercise of the Secretary's authority to administer the statute fairly."¹⁴⁶

Finally, Smith-Corona challenged certain adjustments made for the differences in the products' physical characteristics. The products sold in Japan included accessories and instruction pamphlets that were not included with the products sold in the United States. Smith-Corona argued that these differences should not constitute differences in the physical characteristics of the products when determining the *value* of the merchandise. Yet the court found that because the accessories sold with the Japanese typewriters, like replacement ribbons and instructional handbooks, were not commonly sold with United States typewriters, it was reasonable to find the values between the two different.¹⁴⁷

¹³⁸706 F.2d at 1578-79.

¹³⁹713 F.2d 1568 (D.C. Cir. 1983).

¹⁴⁰19 U.S.C. § 1673 (1982). See 713 F.2d at 1571-73 nn. 7-11.

¹⁴¹713 F.2d at 1574 (footnote omitted)(discussing 19 C.F.R. § 353.15(d) (1980)).

¹⁴²*Id.* at 1574 (discussing 19 C.F.R. § 353.15(c) (1980)). See also *infra* note 163.

¹⁴³713 F.2d at 1577.

¹⁴⁴The court did caution, however, that the Secretary could not "rely on cost to the exclusion of its effect on value." *Id.*

¹⁴⁵*Id.* at 1577 n.27.

¹⁴⁶*Id.* at 1579.

¹⁴⁷*Id.* at 1582.

In *United States v. Roses, Inc.*,¹⁴⁸ certain procedures under the Trade Agreements Act as administered by the International Trade Administration (ITA) were challenged. The plaintiff filed a petition with the ITA seeking "assessment of antidumping duties against the importation of fresh cut roses" by Columbian rose growers.¹⁴⁹ During the twenty day period in which the ITA had to make a determination whether or not an investigation was warranted, officials from the ITA met with the Columbian Embassy and the Columbian Rose Growers Association. During these meetings the plaintiff's petition was discussed, and objections thereto noted.¹⁵⁰ Two days later the ITA requested the plaintiff to withdraw his petition or it would be dismissed. The plaintiff then filed suit in the Court of International Trade (CIT), seeking to set aside the initial negative determination and for an order to compel the ITA to commence an investigation. The lower court found in favor of the plaintiff and the ITA appealed.¹⁵¹

ITA argued that it had made its decision not to investigate based upon evidence from sources other than Columbian officials, and that the CIT could not order ITA to conduct an investigation.¹⁵² The court of appeals took note of the assumption of governmental regularity that the ITA was seeking to invoke, in order to prove that it had not relied on the "evidence [it had] illegitimately obtained"¹⁵³ in arriving at its decision. The court went on to recognize, however, that the presumption actually worked to the ITA's disadvantage: "If it appears irregular, it is irregular, and the burden shifts to the proponent to show the contrary."¹⁵⁴

The court next examined the question of whether or not the CIT erred in ordering the ITA to investigate. The court reviewed the statute's legislative history and recognized that the agency was given broad discretion and authority to determine when an investigation was proper. The court found that Congress intended the agency's expertise to determine whether or not circumstances warranted an investigation.¹⁵⁵ Therefore, the court held that even when an agency employs procedures "tainted by illegality . . . it must . . . be an abuse of authority for a CIT judge to substitute his own opinion for that of the agency."¹⁵⁶

¹⁴⁸706 F.2d 1563 (D.C. Cir. 1983).

¹⁴⁹*Id.* at 1564. "Roses Incorporated is a trade association of domestic rose growers" *Id.*

¹⁵⁰*Id.*

¹⁵¹*Id.* at 1565.

¹⁵²*Id.* at 1566, 1568.

¹⁵³*Id.* at 1567.

¹⁵⁴*Id.*

¹⁵⁵"[I]t would be absurd and inconsistent to say an outside party could compel an investigation the agency knew of its own knowledge would be unwarranted." *Id.* at 1568.

¹⁵⁶706 F.2d at 1569.

Remanding the case for further proceedings, the court of appeals did observe, however, that investigators other than those who met with Colombian officials should be utilized.¹⁵⁷

c. Taxation and standing of foreign corporations.—California's "unitary tax" was the subject of litigation at the federal court of appeals level in *Shell Petroleum, N.V. v. Graves*.¹⁵⁸ Shell Petroleum, N.V. was a Netherlands corporation owning sixty-nine percent of Shell Oil Company, a Delaware corporation. Shell Oil Company, in turn, owned two corporations doing business within and from California.

Shell Petroleum sought declaratory and injunctive relief to prevent an assessment of taxes under California's method of computation.¹⁵⁹ It argued that the unitary tax formula would produce a "gross disproportion" between the income attributable to the California corporations and their actual income.¹⁶⁰ The court of appeals upheld a dismissal of Shell Petroleum's claim for lack of ripeness and standing. Shell argued it had standing because of its national status under the Treaty of Friendship, Commerce and Navigation.¹⁶¹ The court, however, found the treaty only granted Shell Petroleum the same rights as a domestic shareholder. By the court's analysis, Shell, as a shareholder, had not been "injured directly and independently of the corporation," and therefore, could not sue for injury to the California corporations in which it had an interest.¹⁶²

As for the ripeness issue, Shell argued that although administrative hearings regarding the tax assessments in question had just begun, most of the information would have to come from it, the principal stockholder. The court rejected this argument; quoting the lower court, the court of appeals relied on policies underlying the Tax Injunction Act¹⁶³ to hold that Shell's action was not yet ripe. The court found other administrative and state court remedies could be pursued, and therefore the district court's dismissal was affirmed.¹⁶⁴

¹⁵⁷*Id.* at 1571.

¹⁵⁸709 F.2d 593 (9th Cir. 1983), *cert. denied sub nom.* Shell Petroleum N.V. v. Franchetti, 104 S. Ct. 537 (1983).

¹⁵⁹First, "the Board determines which operations . . . are sufficiently integrated in the production of overall corporate income to warrant 'unitary' treatment." 709 F.2d at 595. Second, ratios are computed based on the taxpayer's total property, payroll, and sales values in California compared to the same items of the unitary business throughout the world. Third, "The average of the ratios is then applied to the worldwide net income of the unitary business to determine the taxpayer's income in California for tax purposes." *Id.*

¹⁶⁰*Id.*

¹⁶¹Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942. See 709 F.2d at 595 n.1.

¹⁶²709 F.2d at 595.

¹⁶³28 U.S.C. § 1341 (1982). See 709 F.2d at 597.

¹⁶⁴709 F.2d at 596-99.

d. Patent and trademark.—The year 1983 was not an especially prolific year for international patent and trademark litigation. A case of some note, however, is *Schaper Manufacturing Co. v. United States International Trade Commission*.¹⁶⁵ There, the owner of a toy patent sued for infringement of its patent, and sought review of an ITC order terminating an investigation of unfair trade practices proscribed by the Tariff Act of 1930.¹⁶⁶ That Act makes illegal any trade practices which would “destroy or substantially injure an industry, efficiently and economically operated . . . in the United States.”¹⁶⁷ The plaintiff maintained that the defendant had imported copies of the patented design without permission in violation of the Act.¹⁶⁸

The court of appeals ruled that without any production in the United States, there is no “industry” as defined by the legislative history of the Act. Therefore, there was no destruction of the industry and no violation of the Act.¹⁶⁹ Although Schaper Manufacturing was a licensee of the patent holder, its manufacturing was performed by a Hong Kong corporation in Hong Kong. By the court’s analysis, the design of the toys and the unpatented design of the accessories alone did not constitute production.¹⁷⁰ Therefore, where a corporation has its manufacturing operations, quality control, and most of its packaging performed abroad, it can not be deemed to have produced the product, and it is not covered by the Act as a protected “industry.”¹⁷¹

A significant case relating to the extraterritorial reach of the Lanham Trademark Act¹⁷² was *American Rice, Inc. v. Arkansas Rice Growers Cooperative Association*.¹⁷³ American Rice used a logo on bags of rice it sold in Saudi Arabia,¹⁷⁴ and on which it owned a United States trademark. The logo depicted a young girl eating rice and employed the colors of red, green, and yellow. Beginning in 1974, the Arkansas Rice Growers Cooperative also began to sell rice in Saudi Arabia under a similar logo and using the same colors.¹⁷⁵

In 1981, American Rice filed suit charging Arkansas Rice Growers with trademark infringement under the Lanham Act.¹⁷⁶ After American Rice obtained permanent injunctive relief, Arkansas Rice Growers ap-

¹⁶⁵717 F.2d 1368 (D.C. Cir. 1983).

¹⁶⁶19 U.S.C. § 1337 (1982).

¹⁶⁷*Id.*

¹⁶⁸717 F.2d at 1369.

¹⁶⁹*Id.* at 1372.

¹⁷⁰*Id.* at 1371-73 & n.7.

¹⁷¹*Id.*

¹⁷²15 U.S.C. §§ 1051 to 1150 (1982).

¹⁷³701 F.2d 408 (5th Cir. 1983).

¹⁷⁴American Rice was the market leader in Saudi Arabian rice sales. *Id.* at 410.

¹⁷⁵*Id.* at 411.

¹⁷⁶15 U.S.C. § 1051 (1982).

pealed, arguing that the trial court did not have jurisdiction over the use of trademarks in Saudi Arabia. The court of appeals referred to *Steele v. Bulova Watch Company*,¹⁷⁷ in which the United States Supreme Court held that the Lanham Act has extraterritorial reach over the acts of American citizens that constitute unfair competition, even if consummated in a foreign country.¹⁷⁸ The court of appeals, in determining whether or not jurisdiction should have been asserted, looked to whether or not the defendant was a citizen or resident of the United States; the effect, if any, on the commerce of the United States; and whether or not there was a conflict with foreign laws.¹⁷⁹ The court, finding all three factors present, held that the district court did not err in asserting jurisdiction over the defendant.¹⁸⁰

American Rice Growers also argued that the doctrine of forum non conveniens should prevent jurisdiction by a court of the United States. Rejecting this argument, the court held that because no alternative forum existed in Saudi Arabia, and the law of the United States was the governing law in this case, the United States was an appropriate forum.¹⁸¹

e. Sovereign immunity.—The full effect of the Foreign Sovereign Immunities Act of 1976 (FSIA)¹⁸² has yet to be determined. However, decisions handed down during this survey period provided some clarification of the Act. In *Ministry of Supply, Cairo v. Universe Tankships, Inc.*,¹⁸³ the Second Circuit Court of Appeals ruled that sovereign immunity does not bar a cross-claim if it can be shown that the commercial activities exception of the FSIA¹⁸⁴ is applicable. Under this section, sovereign immunity is withdrawn when a cause of action is based “upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”¹⁸⁵

In *Universe Tankships*, the Ministry of Supply of Cairo filed suit alleging damage to a shipment of grain it had ordered. Soon thereafter, Babanaft International Company was permitted to intervene as both a claimant and a cross-claimant against the plaintiff. Babanaft complained it lost time under its time charter, resulting from an order by the Ministry to delay unloading the grain for two weeks. The district court dismissed

¹⁷⁷344 U.S. 280 (1952).

¹⁷⁸*Id.* at 281, *discussed in* 701 F.2d at 413.

¹⁷⁹701 F.2d at 414. The court noted, however, that these factors were not exclusive. Rather, these factors should be the “primary elements in any balancing analysis.” *Id.*

¹⁸⁰*Id.* at 414-16.

¹⁸¹*Id.* at 417.

¹⁸²28 U.S.C. §§ 1330, 1332(a)(2) to 1332(a)(4), 1391(f), 1441(d), 1602 to 1611 (1982).

¹⁸³708 F.2d 80 (2d Cir. 1983).

¹⁸⁴28 U.S.C. § 1605(a)(2).

¹⁸⁵*Id.*

Babanaft's cross-claim because of the sovereign immunity of the Ministry, and Babanaft appealed.¹⁸⁶

The district court had looked only at a small part of the pertinent statute, and concluded that the length of time it took the plaintiffs to discharge a ship had "no 'direct effect' in this country,"¹⁸⁷ and therefore sovereign immunity protected plaintiff from Babanaft's cross-claim. On review, the court of appeals looked at the entire section involving exceptions to sovereign immunity. It found that the district court failed to take note of the section in which immunity was withdrawn. That section provides an exception to sovereign immunity whenever a cause of action is based on a commercial activity carried on in the United States by a foreign country. The court determined that if the acts in question were an "integral part of the state's 'regular course of commercial conduct . . . having substantial contact with the United States'" then immunity should be withdrawn.¹⁸⁸ Examining the legislative history, the court noted that even as little commercial contact as "'receiv[ing] financing from a private or public lending institution located in the United States'" would be sufficient to satisfy the "substantial contact" standard and create an exception.¹⁸⁹ Babanaft's claim was based on the "plaintiffs' entire course of activity in arranging . . . for the purchase of the wheat and its transportation."¹⁹⁰ Thus, the court determined, because the Ministry had purchased the grain in the United States, sufficient commercial activity existed to invoke the exception.¹⁹¹

The Ministry countered by pointing out that Congress had made a special and separate exception for counter-claims, while not making one for cross-claims.¹⁹² Thus, the Ministry argued that Congress had effectively prevented any exceptions to sovereign immunity for cross-claims.¹⁹³ The court rejected the Ministry's argument. It determined that the language in the statute, outlining exceptions to immunity, was broad enough to include cross-claims. Furthermore, the court could think "of no good reason why Congress should have wished to preserve sovereign immunity [in cross-claims] . . . while withdrawing that immunity" when a counter-claim is sought.¹⁹⁴

¹⁸⁶708 F.2d at 83-84.

¹⁸⁷*Id.* at 83.

¹⁸⁸*Id.* at 84.

¹⁸⁹*Id.* (quoting H.R. REP. NO. 1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6615-16).

¹⁹⁰708 F.2d at 84.

¹⁹¹*Id.*

¹⁹²28 U.S.C. § 1607 (1982).

¹⁹³708 F.2d at 86.

¹⁹⁴*Id.*

In *S & S Machinery Co. v. Masinexportimport*,¹⁹⁵ the Second Circuit Court of Appeals was asked to determine whether or not a foreign trading company and a Romanian bank were agencies or instrumentalities of a foreign state, and thus immunized from a prejudgment attachment. S & S Machinery bought several Romanian-made lathes, drills, and machine parts from Masinexportimport (Masin). It was to pay for them with an irrevocable letter of credit in favor of the Romanian Bank for Foreign Trade, the collection agent for Masin.¹⁹⁶ When S & S accepted delivery of the machine tools, it objected to their quality. It then filed suit for damages in a lower state court and obtained a prejudgment attachment order to freeze the American assets of Masin and of the Romanian Bank for Foreign Trade.¹⁹⁷ The defendants successfully removed the action to federal court eventually obtaining dissolution of the attachment order. The district court determined that the defendants were agencies of the Romanian government, and therefore protected under the FSIA.¹⁹⁸

S & S appealed the dissolution order, but the Second Circuit affirmed.¹⁹⁹ The court observed that the legislative history of the FSIA reveals that foreign trading corporations and central banks should be considered as agencies of a foreign state.²⁰⁰ The court decided that there was sufficient evidence to demonstrate that the agencies in question were agencies of the state.²⁰¹

S & S also argued that as a result of the waiver of immunity provision of the Agreement On Trade Relations Between the United States and the Romanian Governments, the defendants waived immunity

¹⁹⁵706 F.2d 411 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 161 (1984).

¹⁹⁶706 F.2d at 412.

¹⁹⁷*Id.*

¹⁹⁸*Id.* at 413.

¹⁹⁹*Id.*

²⁰⁰*Id.* See 28 U.S.C. § 1603(b) (1976). The legislative history explains the types of entities intended to be included as state agencies: "As a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation . . . a central bank, [or] an export association" H.R. REP. NO. 1487, 94th Cong., 2d Sess. 15-16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6614, *quoted in* *S&S Machinery*, 706 F.2d at 414.

²⁰¹The controlling clause provides in part:

Nationals, firms, companies and economic organizations of either Party shall be afforded access to all courts, and, when applicable, to administrative bodies They shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions, except as may be provided in other bilateral agreements.

706 F.2d at 417-18 (quoting Agreement on Trade Relations Between the United States and the Romanian Government, Apr. 2, 1975, art. IV, 26 U.S.T. 2305, 2308-09, T.I.A.S. No. 8159, at 2.).

to prejudgment attachments.²⁰² In reply, the court held “that the waiver of immunity from ‘other liability’ does not explicitly waive immunity from prejudgment attachment.”²⁰³ Finally, the court affirmed the district court’s dissolution of an injunction preventing negotiation of the letters of credit. It held that courts could not grant injunctive relief to do something they could not do by attachment.²⁰⁴

The Seventh Circuit examined the counter-claim and expropriation exceptions to immunity under the FSIA in *Alberti v. Empresa Nicaraguense De La Carne*.²⁰⁵ Alberti and Albert International, Inc. were thirty-five percent shareholders of Empacadora Nicaraguense, S.A., before Nicaragua nationalized Empacadora in 1979. The plaintiffs estimated their stock was worth \$1,163,630.30 at the time of expropriation. Yet the plaintiffs never received any compensation for their interest in Empacadora. Following nationalization, Alberti International ordered \$739,306.45 worth of frozen beef from ENCAR, the successor to Empacadora. The beef was delivered, but never paid for.²⁰⁶ Instead, Alberti brought an action against Empresa for the wrongful conversion of his property, and sought a declaratory judgment empowering him to set off the purchase price of the beef against the value of his stock in his expropriated corporation. The district court dismissed and Alberti appealed.²⁰⁷

The Seventh Circuit Court of Appeals affirmed the dismissal on several bases. First, the court determined it lacked jurisdiction over the defendants because of improper service of process.²⁰⁸ The FSIA requires service on the “head of the ministry of foreign affairs of the foreign state,”²⁰⁹ and Alberti had served the Nicaraguan Ambassador. The court found that such a delivery did not meet the intentions of Congress, and as such was inadequate.²¹⁰ Second, the court held that the commercial activities exception to immunity²¹¹ did not apply since the controversy

²⁰²706 F.2d at 416-17. See Agreement on Trade Relations Between the United States and the Romanian Government, Apr. 2, 1975, art. IV, 26 U.S.T. 2305, 2308-09 T.I.A.S. No. 8159, at 2. In interpreting the term “or other liability” the court relied on the construction of identical language found in a treaty between the United States and Iran. 706 F.2d at 416-17.

²⁰³706 F.2d at 417.

²⁰⁴*Id.* at 418.

²⁰⁵705 F.2d 250 (7th Cir. 1983).

²⁰⁶*Id.* at 252.

²⁰⁷*Id.*

²⁰⁸*Id.* at 253.

²⁰⁹28 U.S.C. § 1608(a)(3) (1982). This section of the FSIA “establishes a federal long-arm statute for suits against foreign states, [and] delineates the ‘exclusive procedures’ for effecting service of process upon a foreign state.” 705 F.2d at 253.

²¹⁰705 F.2d at 253.

²¹¹See *supra* notes 188-91 and accompanying text. See also 28 U.S.C. § 1605(a)(2) (1982).

underlying the cause of action was the wrongful conversion of Alberti's property, not Alberti's obligation to pay for the beef. Thus, there was no commercial activity to place this case within the FSIA's exceptions. Third, it was determined that Alberti could not invoke the counter-claim exception in his suit for declaratory relief. Before this exception applies, the court held, he must be sued by Nicaragua.²¹² Finally, the court rejected Alberti's argument that the court lacked jurisdiction under the FSIA provision that removes violations of international law from the protection of sovereign immunity. The court found that the exception did not apply unless it could be shown that the expropriation violated international law.²¹³ Because Alberti failed to answer the defendant's motion to dismiss, there was no evidence from which a violation of law was established. Therefore, the dismissal of Alberti's claim was affirmed.²¹⁴

f. Jurisdiction.—For many years, United States courts have sought to define the extent of their extraterritorial jurisdiction in a variety of situations. For example, during the survey period the Fifth Circuit Court of Appeals determined that United States courts could exert extraterritorial jurisdiction in particular trademark infringement cases.²¹⁵

Significant foreign jurisdictional issues were decided by the Court of Appeals for the Seventh Circuit in *Nelson ex. rel. Carlson v. Park Industries, Inc.*²¹⁶ Nelson, a minor, was burned when her cotton flannel shirt caught fire. United Garment Manufacturing Company (United), a Hong Kong corporation, had manufactured the shirt and delivered it to Bunnan Tong & Company, a Hong Kong distributor and the purchasing agent for the F.W. Woolworth Company (Woolworth). Eventually, Woolworth sold the shirt in a Wisconsin store to Nelson. Nelson filed suit and Bunnan and United filed motions to dismiss for lack of personal jurisdiction.²¹⁷ The district court granted their motions to dismiss. It determined that neither Bunnan nor United had sufficient contacts or relations with the State of Wisconsin, and that there was "no more than a mere likelihood"²¹⁸ that the shirt would even be sold in Wisconsin.²¹⁹

²¹²705 F.2d at 254.

²¹³*Id.* at 255.

²¹⁴*Id.* at 256.

²¹⁵*American Rice, Inc. v. Arkansas Rice Growers Coop. Ass'n*, 701 F.2d 408 (5th Cir. 1983). See *supra* notes 173-81 and accompanying text.

²¹⁶717 F.2d 1120 (7th Cir. 1983), *cert. denied sub nom. Bannan Tong & Co. v. F.W. Woolworth Co.*, 104 S. Ct. 1277 (1984).

²¹⁷717 F.2d at 1122. See FED. R. CIV. P. 12(b)(2).

²¹⁸717 F.2d at 1122.

²¹⁹*Id.*

The court of appeals reversed the orders dismissing United and Bunnan. Applying the Wisconsin long arm statute,²²⁰ the court found that both of the defendants had processed a product (the flannel shirt) which was used in the state in the ordinary course of trade. Rejecting Bunnan's argument, the court held that "process" did "include a distributor's purchase and sale of goods in the normal course of the distribution of those goods."²²¹

Relying on *World-Wide Volkswagen v. Woodson*,²²² the court reasoned that when a defendant puts a product into the "stream of commerce" and it is foreseeable that the product will be sold or used in the foreign state, the foreign state will have personal jurisdiction over the defendant without offending due process.²²³ Both Bunnan and United argued that they did not place the flannel shirt into the "stream of commerce" because each transaction between the parties was separate, and after the transactions neither had control over the goods.²²⁴ The court rejected this argument:

Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible. For this reason, a manufacturer or primary distributor may be subject to a particular forum's jurisdiction . . . because the manufacturer and primary distributor have intended to serve a [broad] market and they derive direct benefits from serving that market.²²⁵

In determining whether or not the Hong Kong defendants could have reasonably anticipated being "haled into court" in Wisconsin, the court reviewed the distribution system used by the defendants. It reasoned that it was sufficiently foreseeable to the defendants that Woolworth would market the shirts in Wisconsin since the parties had done business with each other for several years; the employees of the companies often visited each other's offices; and, the defendants knew that the shirts were sold at retail outlets throughout the United States.²²⁶

²²⁰*Id.* at 1123-24 (quoting WIS. STAT. § 801.05(4)(b) (1981-82)). This section provides: In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury . . . [p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

WIS. STAT. ANN. § 801.05(4)(b) (1977).

²²¹717 F.2d at 1124 (footnote omitted).

²²²444 U.S. 286 (1980).

²²³717 F.2d at 1125 (citing 444 U.S. at 297-98).

²²⁴717 F.2d at 1126.

²²⁵*Id.* at 1125-26 (citations omitted).

²²⁶*Id.* at 1126-27.

In a similar case, the Fifth Circuit Court of Appeals arrived at a different conclusion. *Talbot Tractor Co. v. Hinomoto Tractor Sales, USA*²²⁷ was a suit brought by Talbott against Hinomoto for breaching an exclusive dealership contract at the inducement of Southern Tractor Corporation, a competing tractor distributor. Hinomoto and Southern sought to join Kameatsu-Gosho, Inc. (Kameatsu) as a third party defendant, "alleging that if there was a failure to meet their contractual obligations, . . . [Kameatsu] had caused the damages alleged by Talbot."²²⁸

The district court dismissed the claim against Kameatsu for want of personal jurisdiction in Louisiana. The court of appeals affirmed the trial court; noting that because Kameatsu was a national distributor importing tractors from Japan and delivering them to the Port of Houston for national distribution, it was not foreseeable to Kameatsu that such a claim would arise in Louisiana.²²⁹ The court agreed with Kameatsu that it should not base personal jurisdiction over it on the basis of Hinomoto's contacts with Louisiana. It noted that Hinomoto and Southern did not allege that Kameatsu sold to Hinomoto for the purpose of penetrating the Louisiana market, and that, in fact, Kameatsu had limited its operations to Houston in order to avoid exactly this extension of personal jurisdiction.²³⁰ Relying on *World-Wide Volkswagen*,²³¹ the court affirmed the dismissal for lack of personal jurisdiction.²³²

The Seventh Circuit Court of Appeals decided yet another case involving international parties and questions of jurisdiction in *In re Oil Spill by the Amoco Cadiz off the Coast of France*.²³³ A group of French citizens sued Amoco for damages resulting from the negligent operation of its tanker; in addition, they sued Astilleros Espanoles, S.A., a Spanish corporation, for the negligent design of the ship.²³⁴ Amoco filed a cross-claim for indemnification and a third party complaint against Astilleros, alleging the latter was primarily responsible for the damage.

The court rejected Astilleros' argument that it was not subject to the jurisdiction of the district court, since Astilleros had signed the contract to sell the ship in Chicago.²³⁵ The court also determined there was jurisdiction over the claim of the French plaintiffs against Astilleros,

²²⁷703 F.2d 143 (5th Cir. 1983).

²²⁸*Id.* at 144.

²²⁹*Id.* at 145.

²³⁰*Id.*

²³¹444 U.S. 286 (1980).

²³²703 F.2d at 146-47.

²³³699 F.2d 909 (7th Cir. 1983), *cert. denied*, *Astilleros Espanoles, S.A. v. Standard Oil Co.*, 104 S. Ct. 196 (1983).

²³⁴699 F.2d at 912.

²³⁵*Id.* at 916.

because a determination of whether the ship was used negligently depended upon the contract which was negotiated and accepted in Chicago. The court noted that it might seem odd that “the French [are] . . . suing the Spanish in a court in Chicago because of an oil spill off the French coast” Yet “[t]he additional hardship to Astilleros [could not be too] great and [was] outweighed by the advantages of consolidating all the claims.”²³⁶ With that, the court affirmed the default judgments against Astilleros.

*In re Marc Rich & Co., A.G.*²³⁷ presented a more complicated jurisdiction issue. There, the Second Circuit Court of Appeals held that it had jurisdiction to enforce a subpoena duces tecum and a grand jury investigation of a Swiss corporation, finding there were sufficient contacts with New York. The Swiss corporation owned a wholly-owned subsidiary in New York. The grand jury was investigating the New York subsidiary for alleged diversion of \$20,000,000 to its parent in an attempt to evade federal tax liability. The defendant, the parent Swiss corporation, refused to obey the subpoena because it said the court lacked personal jurisdiction.²³⁸

The court of appeals noted that a grand jury must make a prima facie showing that jurisdiction exists before it may subpoena a witness.²³⁹ “A federal court’s jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction.”²⁴⁰ Jurisdiction was present here because sufficient evidence demonstrated that federal tax laws had been evaded, hence the case was within the territorial principles of jurisdiction recognized by many countries.²⁴¹ The court also found that two of the five directors of the Swiss corporation were United States residents; the subsidiary was doing business in New York; and, at least one director was a participant in the tax evasion scheme; therefore, it was likely that some conspiratorial acts occurred in the United States.²⁴²

g. Letters of credit.—The letter of credit is basic to the financing of export sales worldwide. Yet they are complex and can involve many parties. This complexity was demonstrated in *Voest-Alpine International Corp. v. Chase Manhattan Bank*,²⁴³ where an agency of the Indian

²³⁶*Id.* at 917.

²³⁷707 F.2d 663 (2d Cir. 1983), *cert. denied*, 103 S. Ct. 3555 (1983).

²³⁸707 F.2d at 665.

²³⁹*Id.* at 670.

²⁴⁰*Id.* at 669 (citations omitted). The court also pointed out that the answer to the question before it was not in New York’s long-arm statute: “[The Grand Jury’s] right to inquire of appellant depends upon appellant’s contacts with the entire United States, not simply the state of New York.” *Id.* at 667 (citation omitted).

²⁴¹*Id.* at 666.

²⁴²*Id.* at 668.

²⁴³707 F.2d 680 (2d Cir. 1983).

government entered into a contract to buy scrap steel from Voest, an Austrian corporation. The Bank of Baroda (India) issued letters of credit as the payment method for the sale. Originally, Chase was to act as an advisory bank and, as such, review documents submitted by Voest. Subsequently however, Chase became the confirming bank of the letters of credit. As a result, Chase committed itself to stand behind the letters of credit issued by the Bank of Baroda to the extent of its confirmation agreement with that bank.²⁴⁴

The scrap was loaded on a ship but never reached India as a result of a mutiny by the ship's crew. Notwithstanding the mutiny however, Voest submitted the verification documents to Chase which advised the Bank of Baroda that the documents conformed to the requirements of the letter of credit, despite the "irreconcilable inconsistencies" contained in the documents. Baroda uncovered the inconsistencies and refused payment.²⁴⁵ When Chase refused to honor the drafts upon presentment, Voest filed suit against Chase for wrongful dishonor. Voest claimed Chase had waived the right to demand strict compliance, and therefore wrongfully dishonored the demands.²⁴⁶ The district court disagreed, and granted summary judgment against Voest.²⁴⁷

The court of appeals recognized the importance of strict compliance with the terms of such letters of credit.²⁴⁸ It pointed out that requiring strict compliance often protects the bank carrying the absolute obligation: "Adherence to this rule ensures that banks, dealing only in documents, will be able to act quickly, . . . [and] is also essential so as not to impose an obligation upon the bank it did not undertake"²⁴⁹

Chase argued that a waiver analysis was inappropriate since the documents had "incurable" defects. The appellate court rejected this, finding the question of whether a defect could be cured irrelevant, "for it is the right to demand an absence of defects that the party is deemed to have relinquished."²⁵⁰ Applying New York law, the court held that a trier of fact could have concluded from the evidence presented by Voest that Chase had knowledge of his right and an intention to relinquish it. Therefore, "summary judgment was inappropriately granted."²⁵¹ The court of appeals also disagreed with the district court's finding that the

²⁴⁴*Id.* at 683.

²⁴⁵*Id.*

²⁴⁶*Id.* at 684.

²⁴⁷*Id.* The district court also dismissed a third party claim filed by Chase against the Bank of Baroda for indemnification.

²⁴⁸"[A]ttempts to avoid payment premised on extrinsic considerations . . . tend to compromise their chief virtue of predictable reliability as a payment mechanism." *Id.* at 682 (citations omitted).

²⁴⁹*Id.* at 682-83.

²⁵⁰*Id.* at 685.

²⁵¹*Id.*

evidence established that Voest did not commit fraud when it submitted papers not conforming to the letters' requirements.²⁵² Rather, it found a question of fact remaining, and remanded the question to trial. However, the court of appeals did point out that if it were established that Voest did commit fraud, Voest would be estopped from claiming any benefit accruing to it from its misconduct.²⁵³

h. Foreign corrupt practices act and the act-of-state doctrine.—The Foreign Corrupt Practices Act of 1977²⁵⁴ was enacted to eliminate the payment of bribes to foreign officials as a condition precedent to doing business in certain countries. Yet the full power of this Act has not been tested.

In *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*,²⁵⁵ Clayco argued that the act-of-state doctrine²⁵⁶ should be abrogated by the Foreign Corrupt Practices Act.²⁵⁷ The court recognized the purpose behind the doctrine—to prevent hindrance of the executive and legislative branches' conduct in foreign policy matters—and affirmed the district court's full application of the doctrine.²⁵⁸ Next, the court of appeals turned to Clayco's attempts to create an exception to the doctrine. Significantly, Clayco claimed that the Act created an exception. It argued the enactment of the Act was an acknowledgment by Congress that our foreign relations would be better off with a strict antibribery statute. The court pointed out, however, that actions under the Act are public enforcement actions and brought under the wisdom of the Securities and Exchange Commission, the Justice Department, or the State Department.²⁵⁹ Since this case was a private action rather than a public enforcement action, "the act of state doctrine remains necessary to protect the proper conduct of national foreign policy."²⁶⁰ Thus, the court of appeals affirmed the dismissal.

i. Foreign banking litigation.—Regulations pursuant to the International Banking Act of 1978,²⁶¹ which permit the federal government to charter foreign banks in the United States, were challenged in *Con-*

²⁵²*Id.* at 686.

²⁵³*Id.*

²⁵⁴15 U.S.C. §§ 78dd to 78dd-2 (1982).

²⁵⁵712 F.2d 404 (9th Cir. 1983).

²⁵⁶*See supra* note 100.

²⁵⁷Clayco charged Occidental with making secret payments to a foreign official in order to unlawfully obtain off shore oil concessions. 712 F.2d at 405. The district court dismissed the action based on the act-of-state doctrine. It held that plaintiff's burden of proof would require a review of "the ethical validity of the sovereign's conduct." *Id.* at 406.

²⁵⁸*Id.* at 406.

²⁵⁹*Id.* at 409.

²⁶⁰*Id.*

²⁶¹12 U.S.C. §§ 3101, 3108 (1982).

ference of State Bank Supervisors v. Conover.²⁶² There, several New York state officials filed suit, alleging that the Comptroller erred in (1) approving applications for foreign banks to convert their state-licensed branches into federally licensed branches where state law prohibits such changes;²⁶³ (2) permitting other foreign banks to open federal branches and conduct operations in violation of state law;²⁶⁴ and, (3) permitting "federal agencies" to accept deposits from non-U.S. citizens or residents,²⁶⁵ in violation of the Act.²⁶⁶ The district court dismissed the suit and the plaintiffs appealed.²⁶⁷

The court of appeals held that the International Bank Act permits the Comptroller to charter a foreign bank in a particular state, so long as *all* foreign banks are not prohibited from operating in that state by state law.²⁶⁸ The court referred to the Act's legislative history and found it to be ambiguous. As a result, it chose to construe section 4(a) of the Act²⁶⁹ against the backdrop of congressional concern that the objective of the legislation was "to accord foreign banks national treatment, under which 'foreign enterprises . . . are treated as competitive equals with their domestic counterparts.'" ²⁷⁰ The court reasoned that "the establishment of a foreign bank's federally-chartered bank's *initial* home state office is analogous to the establishment of a domestic bank's federally-chartered principal office" ²⁷¹ Because a "state cannot prohibit establishment of a federally-chartered domestic bank's principal office," ²⁷² the court concluded that the regulation permitting such action was proper, and consistent with the terms of the Act.²⁷³

3. *Developments in Federal Legislation.—a. Export control.*—During the survey period, the House of Representatives passed the Export Administration Amendments Act of 1983.²⁷⁴ Under the House version, the bill prohibited "the President from abrogating existing contracts for foreign policy reasons, without the consent of Congress."²⁷⁵ However,

²⁶²715 F.2d 604 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1708 (1984).

²⁶³715 F.2d at 607 (in violation of 12 U.S.C. § 3101(4)(a) (1982)).

²⁶⁴*Id.* (in violation of 12 U.S.C. § 3101(5)(a) (1982)).

²⁶⁵*Id.* (in violation of 12 U.S.C. §§ 3101 (1)(b)(5), (4)(a) (1982)).

²⁶⁶12 U.S.C. §§ 3101, 3108 (1982).

²⁶⁷715 F.2d at 605.

²⁶⁸*Id.* at 607-08.

²⁶⁹12 U.S.C. § 3102(a) (1982).

²⁷⁰715 F.2d at 615 (quoting S. REP. NO. 1073, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1421, 1422 (1978)).

²⁷¹715 F.2d at 617.

²⁷²*Id.*

²⁷³*Id.*

²⁷⁴H.R. 3231, 98th Cong., 2d Sess., 129 CONG. REC. 16870 (1983).

²⁷⁵H.R. EXPORT TASK FORCE, THE YEAR IN TRADE 1983 ANNUAL REPORT OF THE EXPORT TASK FORCE (1983) 1 [hereinafter cited as TASK FORCE].

the President may unilaterally abrogate existing contracts in the event of “imminent or actual aggression, terrorism, nuclear weapons testing or gross violations of human rights.”²⁷⁶ In addition, the House Bill allowed a “licensing exemption for certain exports to countries which cooperate with the United States in applying economic sanctions for national security reasons.”²⁷⁷ Finally, miscellaneous provisions of the House bill would:

- [a] prohibit the President from applying foreign policy export controls extraterritorially, in the absence of specific congressional approval;
- [b] establish procedures to insure that products which are available without restriction to potential adversaries from foreign sources are not unilaterally controlled by the United States;
- [c] prohibit restrictions on the export of food for foreign policy purposes;
- [d] limit funding for the Custom Service’s “Operation Exodus” to \$14 million and expand the Commerce Department’s resources and authorities for enforcing export controls;
- [e] extend statutory restrictions on the export of Alaskan oil to 1987;
- [f] extend Presidential authority to control exports under the Export Administration Act for 2 years.²⁷⁸

The Senate passed its version of the bill in early 1984.²⁷⁹ The Senate’s version of the bill included items that would:

- [a] cede all authority for enforcement of export controls to the Customs Service;
- [b] prevent the President from applying export controls to existing contracts without congressional consent;
- [c] provide for Defense Department review of certain “West-West” licenses that present a danger of diversion of militarily significant items to adversary nations.²⁸⁰

Although the House of Representatives passed the Senate’s bill, it was referred to conference because the House insisted on particular amendments, and has not yet been acted upon.²⁸¹ On March 30, 1984, the Export Administration Act of 1979 expired. On the same day,

²⁷⁶*Id.*

²⁷⁷*Id.* at 2.

²⁷⁸*Id.*

²⁷⁹S. 979, 98th Cong., 2d Sess., 130 CONG. REC. S2062 (1984).

²⁸⁰TASK FORCE, *supra* note 275, at 3. See also CONGRESSIONAL RESEARCH SERVICE, ISSUE BRIEF NO. IB75003, *Export Controls* 1, 6 (1984); CONGRESSIONAL RESEARCH SERVICE, *Major Legislation of the Congress 98th Congress* MLC-039 (1983).

²⁸¹See 130 CONG. REC. 1404 (1984).

President Reagan extended the provisions of the Act, and all regulations and existing licenses issued under the Act, until such time as the Congress reenacts the law.²⁸²

b. International monetary fund.—During the survey period, Congress passed a statute²⁸³ increasing “the [United States] participation in the International Monetary Fund (IMF) by \$8.4 billion.”²⁸⁴ In addition, restrictions strictly regulating the international lending activities of commercial banks were enacted.²⁸⁵

Under these new banking restrictions, “[B]anks are prohibited from charging rescheduling fees to [lesser developed countries] that exceed actual costs associated with such reschedulings, unless these fees are amortized over the life of the loan agreement.”²⁸⁶ In addition, “The Federal Reserve is required to establish so-called ‘capital adequacy’ standards to insure that a bank’s capital resources are not improperly placed at risk by excessive foreign exposure.”²⁸⁷ The Federal Reserve is also directed “to establish regulations governing the creation of special ‘loan-loss’ reserves for problem foreign loans.”²⁸⁸

c. Caribbean basin initiative.—Unquestionably, the most interesting congressional enactment during 1983 was the Caribbean Basin Economic Recovery Act.²⁸⁹ This Act, which was passed over heated opposition from labor groups and small business interests, expands the region’s export opportunities in the United States, thereby encouraging investment and economic growth. For example, it permits the President to eliminate tariffs for nonCommunist Caribbean and Central American countries for the next twelve years.²⁹⁰ The Act requires that products undergo “substantial transformation” during production in the targeted countries, thus products that are only packaged, assembled, or diluted are not eligible. Other ineligible items include textiles, some leather goods, tuna, and petroleum products.²⁹¹ The Act also requires that countries embraced by the Act cooperate with the United States in efforts to control drug

²⁸²Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984).

²⁸³Act of Nov. 30, 1983, Pub. L. No. 98-181, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 1153, 1267.

²⁸⁴TASK FORCE, *supra* note 275, at 4.

²⁸⁵*Id.*

²⁸⁶*Id.* at 5. See also CONGRESSIONAL RESEARCH SERVICE, ISSUE BRIEF No. IB82073, *Guidelines on Export Credit and the Export-Import Bank* (1984).

²⁸⁷TASK FORCE, *supra* note 275, at 5.

²⁸⁸*Id.*

²⁸⁹Act of Aug. 5, 1983, Pub. L. No. 98-67, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 369, 384.

²⁹⁰*Id.* §§ 211 to -12, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) at 384-85.

²⁹¹*Id.* § 213(b), 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) at 388. See also TASK FORCE, *supra* note 275, at 22-23.

trafficking, in sharing bank information for criminal tax purposes, and in complying with United States' copyright laws.²⁹²

The Act is something of an experiment, providing opportunities to a depressed area of the world with cultural and economic values in common with the United States. Some have compared it to the Marshall Plan, but it should be remembered that the Marshall Plan embraced an area of the world with substantial educational and cultural attributes not found to the same degree in the Caribbean. A success here could well portend similar efforts in other parts of the world to raise standards of living and contribute to the increased importation of American products.

The Deficit Reduction Act of 1984²⁹³ was enacted on July 18, 1984. This Act abolished the tax deferral system for Domestic International Sales Corporations (DISC's),²⁹⁴ and exempted income from qualifying Foreign Sales Corporations (FSC's).²⁹⁵

To be eligible to elect FSC status, a corporation must be organized under the laws of a foreign country, have no more than twenty-five shareholders, and have no outstanding preferred stock.²⁹⁶ In addition, an FSC must maintain a foreign office with a resident director, maintain a set of the permanent books at that office, and maintain certain records at a location within the United States.²⁹⁷ A qualified FSC would be able to exempt either 32% or 16/23 of its income, depending upon the type of transaction.²⁹⁸ Furthermore, if an FSC met the requirements of a "Small FSC," its first \$5 million would not even be taken into account in calculating its exempt income.²⁹⁹

Surely, the most vehemently contested legislation of the 98th Congress was the domestic content bill, titled the Fair Practices in Automotive Products Act, which passed the House of Representatives on November 3, 1983.³⁰⁰ This bill "would require [foreign] auto manufacturers with U.S. sales of over 100,000 units to produce a significant portion of their cars in the United States."³⁰¹ For model year 1985, automakers

²⁹²*Id.* § 212(b)(5) & (6), 1983 U.S. CODE CONG. & AD. NEWS at 336.

²⁹³Act of July 18, 1984, Pub. L. No. 98-369, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 494.

²⁹⁴Act of July 18, 1984, Pub. L. No. 98-369, § 802(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 997 (amending 26 U.S.C. § 995 (1982)).

²⁹⁵Act of July 18, 1984, Pub. L. No. 98-369, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 494, 985-1003.

²⁹⁶*Id.* at 986.

²⁹⁷*Id.*

²⁹⁸*Id.* at 986-87.

²⁹⁹*Id.* at 988.

³⁰⁰H.R. 1234, 98th Cong., 1st Sess., 129 CONG. REC. 9120 (1983). The bill was introduced in the Senate but no action was ever taken.

³⁰¹TASK FORCE, *supra* note 275, at 11.

with sales of 100,000 to 900,000 units must commit to a domestic content of 3.37 to 30%, and by 1987, to 10% and 90% for the same number of units. In the case of sales over 900,000 units, the requirements would be 30% for 1985 and 90% for 1987. The bill authorizes the Transportation Department to administer the legislation.³⁰²

Its proponents argue that it is the only reliable method to offset the discriminatory trade practices of foreign automakers. They claim that unless such drastic steps are taken, the automobile industry will continue to wither and perhaps die. Its opponents believe that domestic content legislation will cause a return to the disastrous high tariff days before the onslaught of the Depression. In addition, they believe that domestic content legislation will fail its appointed purpose and will unleash a backlash in other countries with paralyzing effects on American export industries. The healthy rebound of the automobile industry may reduce some of the impetus for passage of the bill, but the rescission of quotas on Japanese imports, should it occur, could reignite the pressure for its passage.

d. Trade reorganization.—On April 25, 1983, the Reagan Administration announced plans to reorganize the executive branch's trade functions. As a result, changes were made in the original Roth bill which, at that time, had passed the Senate Governmental Affairs Committee.³⁰³ Not only has the House held hearings on the issue of trade reorganization, it has also witnessed the introduction of a reorganization bill that includes a framework for an industrial policy mechanism designed to satisfy House Democrats.³⁰⁴

The most publicized trade reorganization bill was that introduced by Senator William Roth in January of 1983.³⁰⁵ His bill would have abolished the Department of Commerce and created a new Department of International Trade and Industry. The new department would assume most of the Department of Commerce's international functions, and would exercise the duties of the Office of the United States Trade Representative. Noninternational offices would have been shifted to other departments.³⁰⁶

e. Reciprocity.—The Senate passed the Reciprocal Trade and Investment Act on April 21, 1983.³⁰⁷ It would expand the President's authority under section 301 of the Trade Act of 1974,³⁰⁸ to permit him

³⁰²*Id.*

³⁰³*Id.* at 20-22.

³⁰⁴*Id.*

³⁰⁵S. 121, 98th Cong., 1st Sess. (1983).

³⁰⁶TASK FORCE, *supra* note 275, at 11. See also, S. REP. NO. 374, 98th Cong., 1st Sess. (1983).

³⁰⁷S. 144, 98th Cong., 1st Sess., 129 CONG. REC. § 5106-11 (1983).

³⁰⁸19 U.S.C. §§ 2101 to 2487 (1982).

to take retaliatory steps against countries which fail to give American exporters or investors the same opportunities as their own firms.

f. Foreign corrupt practices act reform.—The Foreign Corrupt Practices Act (FCPA)³⁰⁹ is an issue which draws constant attention. Virtually every session of Congress since the enactment of the FCPA has featured an attempt to amend or abolish the Act.³¹⁰ The 98th Congress was no exception. The proposed 1983 amendments would have effected the following changes:

- a. The “reason to know” test for indirect bribery through third parties would be replaced by a standard which requires an American firm to “direct or authorize, expressly or by a course of conduct,” a third party to pay a bribe to a foreign official;
- b. Criminal liability for accounting violations would be repealed;
- c. “Facilitating” payments would be described in greater detail to explicitly include: gifts that constitute a “token of esteem”; “ordinary” expenditures associated with the sale of a good or service; and payments to “expedite or secure the performance of a routine governmental action.”³¹¹

Of particular note to Indiana, the White House announced new import restrictions on imported specialty steel which placed additional tariffs of eight percent on steel plate and ten percent on strips and sheets. It also imposed quotas on imports of bar, rod, and tool steel. These restrictions will be in effect for several years, but the tariffs are to be gradually reduced and quota ceilings are to be gradually raised over the four year period.³¹² The European Economic Community demanded that because of these restrictions, the United States must grant concessions in some other product category under the General Agreement on Tariffs and Trade. If the United States did not do so, the EEC threatened to restrict exports of chemicals and sporting goods to Europe.³¹³

The United States and the Soviet Union signed a new grain agreement on August 25, 1983.³¹⁴ The Soviet Union agreed to buy between nine million and twelve million tons of wheat and corn each year for the next five years. The United States may not interrupt the flow of grain during the life of the agreement. There is no “short-supply” provision,

³⁰⁹15 U.S.C. §§ 78dd-1 to 78dd-2 (1982).

³¹⁰TASK FORCE, *supra* note 275, at 25.

³¹¹*Id.* at 27.

³¹²*Id.* at 7-8.

³¹³*Id.*

³¹⁴*Id.* at 13.

but the Soviets must notify Washington if they want to purchase more than twelve million tons in a year.³¹⁵ The Soviets may reduce the amount of corn and wheat by the amount of soy bean and soy bean meal they purchase, but they cannot purchase less than four million tons of either wheat or corn in any given year. Finally, private grain dealers which supply the bulk of the commodities to Soviet trading companies must report any sales in excess of one hundred thousand tons within twenty-four hours of the sale.³¹⁶

C. Conclusion

Although the United States did experience some recent difficulties in international trade, significant events of importance to Indiana's commerce did occur. The loan guarantee program, specialty steel quotas, and the Soviet grain agreement are notable examples. Portents of change also occurred, namely congressional passage of the domestic exemption. Pressures for change are mounting, and it is safe to conclude that international trade issues will soon move to the legislative forefront.

Indiana is in need of a comprehensive strategy to take maximum advantage of its favorable environment. In short, Indiana must further internationalize its economy by providing additional educational and international economic services to companies interested in exporting, and by attracting more overseas investments. The Indiana attorneys have a significant role in this process. In increasing their base of international expertise, attorneys will provide invaluable assistance and enjoy significant economic growth opportunities. Hoosier attorneys can also provide the leadership to assist our state in realizing its international potential.

Indiana is now linked to the world economy. The question is whether international factors will manage us or we will manage them. If we plan accordingly, the answer is not in doubt.

³¹⁵*Id.*

³¹⁶*Id.*

Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its twelfth annual Survey of Recent Developments in Indiana Law. This survey covers the period from May 1, 1983, through May 1, 1984. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Administrative Law

R. GEORGE WRIGHT*

A. Exhaustion of Administrative Remedies

1. *Section 1983 Actions in State Court.*—Among the numerous exhaustion cases decided during the past survey period was *State ex rel. Basham v. Medical Licensing Board*.¹ In this case, Basham had unsuccessfully sought from the Board a license to practice the healing art of naprapathy. Basham had failed to file a written request for a hearing before the Board within fifteen days after the denial of his license application.²

On appeal, the court found legally irrelevant Basham's claim that his failure to timely request a hearing before the Board stemmed from the Board's failure to inform him of his statutory right to a hearing or of the statutory time limits within which such a hearing must be requested.³ The court of appeals held that "the AAA [Administrative Adjudication Act] does not require the Board to give Basham notice of his right to a hearing and the time limits for perfecting that right."⁴ Although the court is probably correct that the failure routinely to provide a rejected applicant with a brief indication that slumbering on his rights for a period in excess of fifteen days may result in the barring of any judicial remedy may not rise to an effective denial of the right to a hearing, this failure is dubious public policy and smacks of administrative adversariness. While providing a brief statement of hearing

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¹451 N.E.2d 691 (Ind. Ct. App. 1983).

²*Id.* at 693 (citing IND. CODE § 4-22-1-24 (1982)).

³451 N.E.2d at 695.

⁴*Id.*

rights and requirements with every rejection notice may increase the number of hearings sought, this inexpensive procedure would encourage meritorious as well as meritless requests.

The court of appeals in *Basham* then addressed the issue of whether Basham's filing of an action against the Board in state court under 42 U.S.C. § 1983 excused Basham from his failure to exhaust his state administrative remedies. This issue had been settled in Indiana in *Thompson v. Medical Licensing Board*,⁵ but the effect of the subsequent United States Supreme Court case of *Patsy v. Board of Regents*⁶ had not been addressed by an Indiana state court prior to *Basham*.

In *Patsy*, Justice Marshall, writing for the Court, had stated the issue as "whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U.S.C. § 1983" While neither this formulation nor the rest of the opinion in *Patsy* explicitly differentiated between section 1983 actions brought in federal court and those brought in state court, *Patsy* had been brought in federal court. The possible applicability of *Patsy* to state courts was thus left unclear.

Although the court in *Basham* did not explicitly analyze the opinion in *Patsy*, its reading of *Patsy* as simply reiterating the established rule that exhaustion is not a prerequisite to bringing a section 1983 action in federal as opposed to state court is defensible.⁸

In *Patsy*, Justice Marshall took pains to emphasize the established precedential basis for the Court's result.⁹ The Court quoted a prior case that recognized "the paramount role Congress has assigned to the federal courts to protect constitutional rights."¹⁰ In the course of its discussion of congressional intent regarding state administrative exhaustion in section 1983 cases, the Court in *Patsy* had stated that the enacting Congress had "believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of the state courts."¹¹ This would at least suggest that Congress perceived the

⁵180 Ind. App. 333, 398 N.E.2d 679 (1979) (on petition for rehearing), *cert. denied*, 449 U.S. 937 (1980). During the survey period, *Thompson* was also cited for the proposition that "the provisions of the AAA supersede the provisions of section 1983 in actions brought in state court." *May v. Blinzinger*, 460 N.E.2d 546, 550 (Ind. Ct. App. 1984) (citation omitted) (failure to follow provision for state court review of agency final determinations; state court § 1983 action filed instead). *But see infra* note 18 and accompanying text.

⁶457 U.S. 496 (1982).

⁷*Id.* at 498.

⁸451 N.E.2d at 694.

⁹457 U.S. at 500-01. Among the authorities cited by Justice Marshall was the Indiana-based federal court case of *Carter v. Stanton*, 405 U.S. 669, 671 (1972).

¹⁰457 U.S. at 500 (quoting *Steffel v. Thompson*, 415 U.S. 452, 473 (1974)).

¹¹457 U.S. at 506 (citations omitted).

federal courts, and not the state courts, as havens from state administrative prejudice. Finally, to the extent that *Patsy* was concerned with the burden that never requiring exhaustion in section 1983 actions might impose on federal courts in particular,¹² the policy discussion in *Patsy* was irrelevant to the question of exhaustion in state court section 1983 actions.

Taken together, these considerations suggest that the court in *Basham* was on solid ground in minimizing the import of *Patsy* for state court cases. This conclusion is at least modestly supported by dicta in the Seventh Circuit case of *Scudder v. Town of Greendale, Indiana*.¹³ In *Scudder*, the Seventh Circuit discussed the Indiana statutory exhaustion requirements with respect to adverse zoning determinations before holding that the plaintiff had failed to state a claim for relief under 42 U.S.C. § 1983.¹⁴ The Seventh Circuit in *Scudder* indicated that the Supreme Court in *Patsy* had made “it clear that exhaustion of state remedies is not a condition precedent to bringing suit in federal court under 42 U.S.C. section 1983.”¹⁵ The court in *Scudder* thus referred specifically to federal courts, but did not explicitly intimate an opinion as to the applicability of *Patsy* to state court proceedings.

Other courts, however, have given the *Patsy* opinion a broader interpretation than that adopted in *Basham*. Several state courts have relied on *Patsy* in refusing to impose an exhaustion requirement in state court section 1983 actions, although also without discussing the relevant differences, if any, between state and federal court actions. For example, a New York state court has held on the basis of *Patsy* that “it is now clear that the exhaustion of state administrative or judicial remedies is not a condition precedent to the maintenance of an action pursuant to 42 U.S.C. § 1983.”¹⁶ Similarly, the California Court of Appeals has invoked *Patsy* in holding in the case of a state court section 1983 action that “a plaintiff need not exhaust state mandated judicial or administrative remedies before bringing a U.S.C. sec. 1983 claim.”¹⁷

In light of the ambiguity of *Patsy*, a party in the position of applicant *Basham* who seeks to avoid dismissal for failure to exhaust administrative

¹²*Id.* at 512-13.

¹³704 F.2d 999 (7th Cir. 1983).

¹⁴*Id.* at 1001-02. The court describes, without objection, the statutory exhaustion requirements in Indiana, *id.* at 1001 n.2.

¹⁵*Id.* at 1002.

¹⁶*Broadway & 67th St. Corp. v. City of New York*, 116 Misc. 2d 217, 225, 455 N.Y.S.2d 347, 353 (N.Y. Sup. Ct. 1982). *See also* the opinion of Justice Asch, dissenting in part, in *Montalvo v. Consolidated Edison Co.*, 92 A.D.2d 389, 403, 460 N.Y.S.2d 784, 793 (N.Y. App. Div. 1983).

¹⁷*Logan v. Southern Cal. Rapid Transit Dist.*, 136 Cal. App. 3d 116, 124, 185 Cal. Rptr. 878, 883 (1982) (citation omitted).

remedies may wish to argue that the guiding principle must be that the states are generally barred from impairing or conditioning the exercise or redress of federally created rights, such as those protected by section 1983, through the imposition of an exhaustion requirement.¹⁸

2. *Exhaustion and Constitutional Issues.*—The court in *Basham* also addressed the issue of whether Basham's constitutional claim that the statutory licensing procedure discriminated against naprapaths constituted an exception to the exhaustion requirement. The court of appeals observed that "Basham argues that the constitutionality of a statute is a purely legal question beyond the expertise of an administrative board. We agree, but we believe Basham could have raised his constitutional issue in a trial court through the judicial review procedure of IC 4-22-1-14."¹⁹

It is not clear that the court in *Basham* meant to assert that the exhaustion doctrine is indifferent as to whether a constitutional challenge raises a "purely legal," or facial constitutional challenge or an intensely factual, or an "as applied," constitutional challenge. While other jurisdictions are occasionally more liberal in excepting constitutional challenges from an exhaustion requirement,²⁰ it seems clear that the Indiana courts are disposed to find an exception to the administrative exhaustion requirement where the constitutional claim at issue can be variously characterized as "purely legal," or facial, or as "procedural."²¹

A similar issue was addressed in *Drake v. Indiana Department of Natural Resources*.²² In *Drake*, the appellant landowner argued that the failure of the Indiana Natural Resources Commission to provide him with notice of its proceedings on or decision with respect to lessees' application for an oil drilling permit violated his due process rights in such a way as to exempt him from compliance with the otherwise applicable judicial review requirements.²³

The court of appeals in *Drake* declared:

This case is distinguishable from *Wilson v. Board of Indiana*

¹⁸See *id.* (citing *Adler v. Los Angeles Unified School Dist.*, 98 Cal. App. 3d 280, 288, 159 Cal. Rptr. 528, 532 (1979); *Graham v. City of Biggs*, 96 Cal. App. 3d 250, 255-56, 157 Cal. Rptr. 761, 764 (1979); *Rossiter v. Benoit*, 88 Cal. App. 3d 706, 713, 152 Cal. Rptr. 65, 71 (1979)). For some possible emerging limitations on the *Patsy* doctrine, see *Warfield v. Adams*, 582 F. Supp. 111, 116-17, 117 n.6 (S.D. Ind. 1984) (Sharp, C.J., sitting by designation).

¹⁹451 N.E.2d at 696.

²⁰See, e.g., *Montalvo v. Consolidated Edison Co.*, 92 A.D.2d 389, 403, 460 N.Y.S.2d 784, 793 (1983) (Asch, J., dissenting in part) ("Constitutional questions are for resolution by the courts" (citing *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975))).

²¹See, e.g., *Drake v. Indiana Dep't of Natural Resources*, 453 N.E.2d 293, 296 (Ind. Ct. App. 1983); *Field v. Area Plan Comm'n*, 421 N.E.2d 1132, 1138-39 n.5 (Ind. Ct. App. 1981); *Bowen v. Sonnenburg*, 411 N.E.2d 390 (Ind. Ct. App. 1980). The most authoritative case in Indiana on this point is *Wilson v. Board of the Ind. Employment Sec. Div.*, 270 Ind. 302, 385 N.E.2d 438, *cert. denied*, 444 U.S. 874 (1979).

²²453 N.E.2d 293 (Ind. Ct. App. 1983).

²³*Id.* at 297 (citing IND. CODE § 4-22-1-14 (1982)).

Employment Security Division, (1979) 270 Ind. 302, 385 N.E.2d 438, where the appellant was allowed to bypass available administrative channels and bring suit in circuit court based on a denial of constitutional due process. In that case, the procedures for suspending and terminating unemployment compensation benefits were challenged as being unconstitutional. The appellant did not raise her individual denial of benefits as the error; rather, the issue presented was a purely legal one. Drake claims, on the other hand, that the Agency violated its own regulations and the AAA in determining this particular case. Thus, a factual issue is presented and the AAA requirements for judicial review must be followed.²⁴

The principles guiding appellate decisionmaking in this area should not be controversial. If agency expertise or authority is relevant, or if a thorough factual record is required in order to resolve the constitutional issue, exhaustion is, assuming no exceptional circumstances, a reasonable requirement.²⁵ If, on the other hand, agency procedures have invited or facilitated the failure to pursue administrative remedies in a timely and appropriate fashion, imposing an exhaustion requirement misses the point of the due process challenge.

3. *Waiver of Exhaustion.*—In *United States Auto Club, Inc. v. Woodward*,²⁶ the court of appeals considered a number of interesting issues, including an alleged waiver of exhaustion by a private association.

In this case, a race car owner brought a damages action against the United States Auto Club, Inc. (USAC) stemming from USAC's disallowance of the plaintiff's race qualifying attempt. The owner had timely filed his protest of the disallowance, but upon the denial by USAC's Chief Steward of his protest, the owner filed an action in Marion County Superior Court instead of forwarding his appeal to USAC's Director of Competition as provided for by the applicable USAC rules.²⁷

At a prompt hearing on the owner's request for a preliminary injunction, the court extended the already-expired USAC appeal time limitation an extra day to permit the filing of the owner's appeal with the proper USAC authority. The court further ordered USAC to rule on the owner's appeal by the following day. Both parties complied with the court order, with the owner's appeal being duly denied by USAC.²⁸

²⁴453 N.E.2d at 299.

²⁵See, e.g., 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26:6, at 436 (2d ed. 1983) (citing *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309 (1967)). These and related considerations were also addressed during the survey period in *Northside Sanitary Landfill, Inc. v. Indiana Env'tl. Management Bd.*, 458 N.E.2d 277, 281-82 (Ind. Ct. App. 1984).

²⁶460 N.E.2d 1255 (Ind. Ct. App. 1984).

²⁷*Id.* at 1259.

²⁸*Id.*

The USAC, apparently, did not appeal any aspect of the Marion Superior Court ruling on the preliminary injunction order.

The owner then proceeded to win a jury verdict in his damages action against USAC. USAC's appeal raised, among other issues, the question of the failure to exhaust USAC internal appeal procedures. On appeal, the court determined that the trial court was without authority to extend the contractually binding USAC appeal time limits by its order, and that USAC's right to insist upon exhaustion of its internal appeal process was not waived by its late hearing of the owner's appeal under the compulsion of a court order.²⁹

It is clearly true that the owner in this instance did not exhaust his private administrative remedies within the precise timetable specified by USAC rules. Yet, the court of appeals decision in this case exalts form over substance. Most, if not all, of the purposes³⁰ of exhaustion were served by the compelled exhaustion that occurred on the trial court's order in this case. Clearly the internal USAC administrative remedy may not have been futile prior to its completion,³¹ but it was obviously futile after it had in fact been exhausted without success. Demonstrated futility normally excuses exhaustion,³² and the futility of requiring exhaustion was clearly, if unconventionally, demonstrated in this case.

It is also clear that an exhaustion requirement may be waived by an agency and, presumably, by a private defendant.³³ While waiver is typically thought of as intentional,³⁴ an exhaustion issue may be impliedly waived,³⁵ as by a party's failure to raise the issue in a timely fashion.³⁶ In this case, USAC apparently declined to appeal the trial court's preliminary injunction order, despite its right to do so under Rule 4(B) of the Indiana Rules of Appellate Procedure,³⁷ deciding instead to proceed

²⁹*Id.*

³⁰A summary of the most commonly recognized purposes of an exhaustion requirement is provided in *EEOC v. Roadway Express, Inc.*, 569 F. Supp. 1526, 1528-29 (N.D. Ind. 1983) (citing *McKart v. United States*, 395 U.S. 185 (1979)) and in *Northside Sanitary Landfill, Inc. v. Indiana Env'tl. Management Bd.*, 458 N.E.2d 277, 281 (Ind. Ct. App. 1984).

³¹460 N.E.2d at 1259.

³²*See, e.g.*, *EEOC v. Roadway Express, Inc.*, 569 F. Supp. 1526, 1529 (N.D. Ind. 1983). However, identity or overlap between the original and the rehearing or appellate administrative bodies does not by itself demonstrate futility. *See Northside Sanitary Landfill, Inc. v. Indiana Env'tl. Management Bd.*, 458 N.E.2d 277, 282-83 (Ind. Ct. App. 1984).

³³*See Holloway v. Gunnell*, 685 F.2d 150, 152 n.2 (5th Cir. 1982); *Silver v. Woolf*, 538 F. Supp. 881, 884 (D. Conn. 1982), *aff'd*, 694 F.2d 8 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1525 (1983).

³⁴*See, e.g.*, *Lafayette Car Wash v. Boes*, 258 Ind. 498, 501, 282 N.E.2d 837, 839 (1972).

³⁵*See, e.g.*, *Greenberg v. Bolger Inc.*, 497 F. Supp. 756, 772 (E.D.N.Y. 1980).

³⁶*See Mitchell v. United States*, 664 F.2d 265, 276 (Ct. Cl. 1981), *aff'd*, 103 S. Ct. 2961 (1983).

³⁷*See City of Fort Wayne v. State ex rel. Hoagland*, 168 Ind. App. 262, 342 N.E.2d

with the trial court-ordered exhaustion. There were, therefore, grounds for finding a waiver of exhaustion as well as futility, in addition to substantial compliance with any exhaustion requirement.

4. *Exhaustion by Enforcement Defendants.*—*Metropolitan Development Commission v. I. Ching, Inc.*³⁸ resulted in an interesting and thoughtful opinion dealing with several aspects of the exhaustion doctrine.

In this case, the Marion County Metropolitan Development Commission sought to enjoin I. Ching, Inc. from using its property in violation of local dwelling ordinances. At trial, the defendant I. Ching raised the issue of the zoning ordinance's unconstitutionality as applied to its property. The trial court entered judgment in favor of the defendant, but on appeal the Fourth District Court of Appeals reversed, holding that the defendant should have raised its argument that the ordinance was unconstitutional as applied with a separate body, the Board of Zoning Appeals, in a request for a zoning variance.³⁹

A crucial turning point in the decision came when the court, disagreeing with and distinguishing prior Indiana authority,⁴⁰ held that requiring a defendant to exhaust administrative remedies in an enforcement action was not necessarily improper.⁴¹ The court took the view that in light of the power of the Board of Zoning Appeals to hear constitutional challenges to zoning ordinances as applied,⁴² and of that body's failure to indicate that a petition for a variance would be futile,⁴³ the balance of factors weighed toward requiring exhaustion.⁴⁴

The court of appeals recognized authority to the effect that exhaustion should not be required of enforcement defendants,⁴⁵ but stated that "considerations of administrative autonomy" supported the "better rule" to the contrary.⁴⁶

Requiring exhaustion by enforcement defendants in Indiana may indeed be more defensible than elsewhere, if it is assumed that the filing of an action by the Metropolitan Development Commission does not indicate that the Board of Zoning Appeals would view the ordinance as valid as applied, and that the Commission's opinion on the consti-

865 (1976); *Jacob Weinberg News Agency, Inc. v. City of Marion*, 163 Ind. App. 181, 322 N.E.2d 730 (1975).

³⁸460 N.E.2d 1236 (Ind. Ct. App. 1984).

³⁹*Id.* at 1239-40.

⁴⁰*Id.* at 1240 (citing *Metropolitan Dev. Comm'n v. Waffle House, Inc.*, 424 N.E.2d 184 (Ind. Ct. App. 1981)).

⁴¹460 N.E.2d at 1238.

⁴²*Id.* at 1239 (citing *Metropolitan Bd. of Zoning Appeals v. Gateway Corp.*, 256 Ind. 326, 268 N.E.2d 736 (1971)).

⁴³460 N.E.2d at 1239.

⁴⁴*Id.* at 1239-40.

⁴⁵*Id.* at 1238.

⁴⁶*Id.*

tutionality as applied issue is irrelevant.⁴⁷ Elsewhere, in the case of enforcement actions brought by the agency to whom a variance petition would be brought, exhaustion is often not required. The breadth of the holdings of such cases varies.

In a recent case, for example, the Ohio Supreme Court was confronted with a question of enforcement defendant exhaustion.⁴⁸ That court determined that "there is a difference between those instances in which the landowner in the initial action was the party claiming the relief from the law, and instances in which the landowner was in a defensive position, as here."⁴⁹ The court then broadly held that "[t]he requirement of exhaustion of administrative remedies is not applicable where the constitutionality of a statute is raised as a defense in a proceeding brought to enforce the statute."⁵⁰ Of particular interest was the court's rationale, which would apply even under the facts in *I. Ching*. Quoting the Illinois Supreme Court, the court noted:

"Although there is authority that the rule of exhaustion of administrative remedies has application whether the validity of a zoning ordinance is raised by a defendant or a moving party, . . . there is at the same time the sound principle, based upon the assumption that one may not be held civilly or criminally liable for violating an invalid ordinance, that a proceeding for the violation of a municipal regulation is subject to any defense which will exonerate the defendant from liability, including a defense of the invalidity of the ordinance. . . . Indeed, as one author has observed, 'the tradition is deeply imbedded that * * * statutes may be challenged by resisting enforcement.'"⁵¹

It is clear that in at least some enforcement defendant exhaustion cases, the failure to exhaust administrative remedies is less than a deliberate bypassing or flouting of agency authority. Also to be weighed in the balance are considerations of administrative, as well as judicial, economy. Whatever the virtues of the opinion in *I. Ching*, its rule does not maximize the convenience and dispatch with which defenses to an enforcement action may be raised.⁵²

⁴⁷*Id.* at 1238-39.

⁴⁸*Johnson's Island, Inc. v. Board of Township Trustees*, 69 Ohio St. 2d 241, 431 N.E.2d 672 (1982).

⁴⁹*Id.* at 248, 431 N.E.2d at 677.

⁵⁰*Id.* (quoting the lower court's decision).

⁵¹*Id.* at 248-49, 431 N.E.2d at 677 (quoting *County of Lake v. MacNeal*, 24 Ill. 2d 253, 259-60, 181 N.E.2d 85, 89-90 (1962) (citations omitted) (Ill. 1982)).

⁵²A second case within the general area of exhaustion of administrative remedies by defendants decided within the past survey period was *EEOC v. Roadway Express, Inc.*, 569 F. Supp. 1526 (N.D. Ind. 1983). In this instance, the court, relying on *EEOC v. Cuzzens of Georgia, Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979), held that Roadway's failure to exhaust internal EEOC procedures barred Roadway from raising nonconstitutional defenses to judicial enforcement of an EEOC subpoena, in the absence of a showing of

5. *The Futility Exception to Exhaustion.*—The past survey period was not without its victories for those seeking to excuse their failure to exhaust administrative remedies. In *Ahles v. Orr*,⁵³ the plaintiffs, without commencing or completing administrative proceedings, filed a complaint for declaratory judgment to the effect that an executive order issued by Governor Orr suspending all state merit pay increases was contrary to law and that the plaintiffs were entitled to merit pay increases.⁵⁴

On appeal, the court found that the executive order in this instance was subject to challenge under neither the State Personnel Act⁵⁵ nor the Administrative Adjudication Act.⁵⁶ Exhaustion under these statutes was therefore not required.⁵⁷ The court went on to declare that even if the plaintiffs' complaint were assumed to be subject to statutory exhaustion, their complaint would fall within the recognized exception for futility or inadequacy of remedy. Referring first to the persons named under the State Personnel Act procedures, the court of appeals concluded:

None of these officials or agencies has the power to overrule the Governor or to declare his executive order invalid. Plainly, no adequate remedy is provided and resort to such procedures would be futile. Further, judicial review under the Administrative Adjudication Act likewise would be unavailing. Judicial review could accomplish only a remand to the administrative agency for corrective action. . . . Remand to an agency which is powerless to effect a remedy is both inadequate and an exercise in futility.⁵⁸

It should be noted that exhaustion was not required in this case even though the administrative agencies would presumably have had special expertise in resolving factual issues involved in the plaintiffs' claims of entitlement to merit pay increases.

B. *Administrative Res Judicata*

The relatively recently⁵⁹ developed doctrine of administrative res judicata was considered in *Pequinot v. Allen County Board of Zoning Appeals*.⁶⁰ In this case, the parent company of the plaintiff had, in 1973, been denied permission by the Allen County Board of Zoning

futility. 569 F. Supp. at 1528-29. To have held otherwise would have clearly diminished the usefulness of the internal EEOC review procedures.

⁵³456 N.E.2d 425 (Ind. Ct. App. 1983).

⁵⁴*Id.* at 426 n.l.

⁵⁵IND. CODE § 4-15-2-35 (1982).

⁵⁶IND. CODE §§ 4-22-1-1,-30 (1982 & Supp. 1984).

⁵⁷456 N.E.2d at 426.

⁵⁸*Id.* at 427 (citations omitted). See also *Bolerjack v. Forsythe*, 461 N.E.2d 1126, 1131-33 (Ind. Ct. App. 1984).

⁵⁹Actually, there are clear elements of the application of this doctrine in *Board of Comm'rs of Huntington County v. Heaston*, 144 Ind. 583, 41 N.E. 457 (1895).

⁶⁰446 N.E.2d 1021 (Ind. Ct. App. 1983).

Appeals to construct an asphalt plant at a quarry site because of fear of pollution.⁶¹ The plaintiff, in 1979, filed a similar application for a special exception to construct an asphalt plant at the site, on this occasion proving, in the judgment of the board, that it would meet the stringent state and federal pollution regulations enacted since 1973.⁶²

The remonstrators in *Pequinot* asserted on appeal that the special exception was precluded because of the operation of administrative res judicata. It was apparently assumed on appeal that the relationship between the plaintiff and its parent company was sufficient to constitute privity for res judicata purposes.

The court of appeals referred to what it called its first acknowledgment of the doctrine,⁶³ and to the policy grounds of “‘economy, predictability and repose.’”⁶⁴ The court declined to apply administrative res judicata, however, on the grounds that facts and circumstances had changed so substantially from 1973 to 1979 as to undercut the rationale and applicability of the 1973 determination, while no vested rights had intervened in reliance on the earlier decision.⁶⁵

It is predictable that the administrative res judicata doctrine will often prove difficult to apply. An inquiry into whether the original agency determination was “quasi-judicial” rather than ministerial, or was discretionary, legislative, or investigatory, is merely the beginning. Assuming that the matter or issues decided or potentially raised for res judicata or collateral estoppel purposes can be identified, problems of fairness remain, particularly where the prior determination was informal, or was conducted without benefit of counsel.⁶⁶

⁶¹*Id.* at 1026.

⁶²*Id.* at 1026-27.

⁶³*Id.* at 1026 (citing *Broughton v. Metropolitan Bd. of Zoning Appeals*, 146 Ind. App. 652, 257 N.E.2d 839 (1970)).

⁶⁴446 N.E.2d at 1026 (quoting *Carpenter v. Whitley County Plan Comm’n*, 174 Ind. App. 412, 414, 367 N.E.2d 1156, 1158 (1977)).

⁶⁵446 N.E.2d at 1026-27.

⁶⁶An “adequate opportunity to litigate” the issues was required in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966). For further limitations on the operation of administrative res judicata, see *RESTATEMENT (SECOND) OF JUDGMENTS* § 83 (1982).

Most recently, in *McDonald v. City of West Branch, Michigan*, 104 S. Ct. 1799 (1984), the United States Supreme Court imposed a flat rule denying res judicata or collateral estoppel effect to the results of arbitrations brought pursuant to a collective bargaining agreement where the claimant subsequently brings a federal court section 1983 action. *See id.* at 1804. The Court was particularly concerned with the frequent lack of legal expertise of the arbitrator, limits on the scope of the arbitrator’s authority, and the problem of control of the grievant’s presentation by a union that may have conflicts of interest. *See id.* at 1803. One final consideration, with implications beyond arbitrations, was that “[t]he record of the arbitration proceedings is not as complete [as that in judicial proceedings]; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony

C. Probable Cause Determinations and Civil Rights Claims

The case of *Kimble Division of Owens-Illinois, Inc. v. Busz*⁶⁷ raised the issue whether a determination by the Indiana Civil Rights Commission (ICRC) that no probable cause existed to support a claim of employment discrimination was an “administrative adjudication” that must be made in accordance with the Administrative Adjudication Act (AAA),⁶⁸ or whether it was an essentially unreviewable exercise of the Civil Rights Commission’s statutory⁶⁹ discretion.

The court of appeals held that “a probable cause determination by the ICRC is an administrative adjudication, . . . and because individual rights are being determined, the determination must be made in accordance with the AAA.”⁷⁰ In addition to its statutory analysis, the court noted that while a prosecutor exercises prosecutorial discretion in pursuit exclusively of the public interest, the Indiana Civil Rights Commission is charged not only with upholding the public interest, but with redressing individual grievances as well.⁷¹

The rule in *Busz* has subsequently been codified by means of the past legislative session’s enactment of Public Law 19-1984, which took effect February 29, 1984. As amended, the statutory provision defining “administrative adjudication” now includes “determinations of probable cause and no probable cause and factfinding conferences by the state civil rights commission.”⁷²

The effect of *Busz* and its codification is to reduce agency discretion, and predictably to increase the Commission’s workload.

D. Administrative Search Warrants

In two instances⁷³ during the past survey period, the court of appeals was called upon to review a trial court’s quashing of an administrative

under oath, are often severely limited or unavailable.”” *Id.* at 1804 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974)).

In addition, many administrative adjudications, as in the case of disability claims, are not adversarial. In sum, it seems clear that a party seeking to avoid the imposition of administrative *res judicata* will typically have several arguments to deploy. *See generally* Annot., 52 A.L.R. 3d 494 (1973 & Supp. 1983); Note, *Indiana Variance Proceedings and the Application of Res Judicata*, 46 IND. L.J. 286 (1971).

⁶⁷449 N.E.2d 618 (Ind. Ct. App. 1983).

⁶⁸*Id.* at 621 (citing IND. CODE § 4-22-1-2 (1982)).

⁶⁹*See* IND. CODE § 22-9-1-11 (1982).

⁷⁰449 N.E.2d at 622 (citations omitted).

⁷¹*Id.* By way of contrast, the court of appeals in *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672 (Ind. Ct. App. 1984), declared that the Environmental Management Board “is not required to investigate a reported violation.” *Id.* at 677.

⁷²IND. CODE § 4-22-1-2 (1982 & Supp. 1984).

⁷³*In re* A Search Warrant for the Comm’r of Labor to Inspect the Premises of Frank Foundries Corp., 448 N.E.2d 1089 (Ind. Ct. App. 1983) [hereinafter cited as *Frank Foundries*]; *In re* Search Warrant for the Comm’r of Labor to Inspect the Premises of

search warrant issued to the Commissioner of Labor to search an industrial employer's premises for possible Indiana Occupational Safety and Health Act (IOSHA) violations.

In both cases, the original issuance of the search warrant was supported principally by probable cause affidavits indicating that the warrants were brought in connection with a general program of scheduled inspections concentrating on industries classified as "high hazard" because of relatively high recent lost workday ratios.⁷⁴ In *In re Search Warrant for the Commissioner of Labor to Inspect the Premises of J & P Custom Plating*, the targeted individual business establishment asserted lack of probable cause to support the search warrant, contending that

the classification of "highly hazardous" industries should be founded on more than injury statistics, the 1979 statistics are stale and should be based on state rather than federal injury statistics, and the manuals containing a detailed description of the classification system should be presented as evidence along with evidence of how many Indiana industries and employees fall within the manual's coverage.⁷⁵

J & P also objected on the basis of its small size, type of equipment, and established record of industrial safety, to the contention that it fell within the category of "highly hazardous" industries.⁷⁶

In rejecting these arguments, the court of appeals made the crucial determination that "[t]he State cannot possibly determine which individual companies are 'highly hazardous' by virtue of their particularized injury statistics or the type of equipment employed."⁷⁷ The intention of the court of appeals was to not unduly expand the evidentiary burden borne by the state in routine administrative warrant request cases.

The court of appeals was therefore content to decide the case on the basis of prior authorities upholding OSHA search warrants issued pursuant to neutral, general administrative plans.⁷⁸ For the appropri-

J & P Custom Plating, Inc., 458 N.E.2d 1164 (Ind. Ct. App. 1984) [hereinafter cited as *J & P Custom Plating*].

⁷⁴See *Frank Foundries*, 448 N.E.2d at 1089, 1091 n.l. (Ind. Ct. App. 1983), and *J & P Custom Plating*, 458 N.E.2d 1164, 1165 (Ind. Ct. App. 1984).

⁷⁵458 N.E.2d at 1166.

⁷⁶*Id.*

⁷⁷*Id.* at 1167.

⁷⁸The decisive Indiana authorities were *State v. Kokomo Tube Co.*, 426 N.E.2d 1338 (Ind. Ct. App. 1981) and *Frank Foundries*, 448 N.E.2d 1089 (Ind. Ct. App. 1983). *Kokomo Tube* had established the applicability of a civil, rather than criminal, probable cause standard, as well as the modest degree of specificity required of the supporting affidavits. 426 N.E.2d at 1346, 1348-49. *Frank Foundries* involved the use of affidavits which were less objectionable than those in *J & P Custom Plating* in several respects. The affidavits in *Frank Foundries* were explicit about the minimum lapse of one year between regularly scheduled inspections and provided greater detail about the role employer size and degree

ateness of not requiring any reference to safety conditions or safety history at the individual business to be inspected, the court cited a United States Supreme Court case⁷⁹ dealing with building code inspections.

While it is clearly unreasonable to undermine a neutral and reasonable inspection program by requiring the state to forecast the adverse safety inspection results that may or may not develop, a balancing concern for the fourth amendment rights of non-highly regulated industries suggests that the required evidentiary showing for a search warrant in such cases should be based on the most current and particularized showing as can reasonably be produced without undue cost and time expenditures on the part of the state.

The best balancing of the competing interests would require not only notice to the employer of its industrial classification and of whether the industry was classified as "highly hazardous" or not, but an advance opportunity for the employer to reduce the probability that it would be inspected by making a prior credible demonstration of an exceptional safety record. As matters stand, the safest employer within a broad classification of a given size is no less likely to be inspected under the program than the least safe.⁸⁰ This state of affairs is inconsistent with IOSHA's general policy goal of focusing its resources in such a way as to maximize the reduction of industrial accidents and illnesses.⁸¹

The supporting affidavits in *In re A Search Warrant for the Commissioner of Labor to Inspect the Premises of Frank Foundries Corp.* were more satisfactory, but even they highlighted the dubious procedure of essentially immunizing the most dangerous industries as a whole from further programmed inspections until 166 less dangerous, but still "highly hazardous," industries had been inspected in their turns.⁸² It would not be surprising to discover a greater "safety gap" between the most and least safe of the "highly hazardous" industries than between the safest of the "highly hazardous" industries and the least safe of the non-highly hazardous industries.

Frank Foundries is particularly noteworthy for its disposal of the argument, which had been successful at trial, that the Target Industries Program discussed in the supporting affidavits was a rule subject to promulgation under the Administrative Adjudication Act,⁸³ and not merely

of hazardousness played in the implementation of the regularly scheduled inspection program; the affidavits in *J & P Custom Plating* contained no satisfactory counterpart. See 448 N.E.2d 1089, 1091 n.l.

⁷⁹Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

⁸⁰See *J & P Custom Plating*, 458 N.E.2d at 1165; *Frank Foundries*, 448 N.E.2d 1089, 1091 n.l (Ind. Ct. App. 1983).

⁸¹See *J & P Custom Plating*, 458 N.E.2d at 1165; *Frank Foundries*, 448 N.E.2d 1089, 1091 n.l (Ind. Ct. App. 1983).

⁸²448 N.E.2d at 1091 n.l.

⁸³See IND. CODE §§ 4-22-2-2,-3 (1982).

an internal policy. The court of appeals held that the inspection program need not have been promulgated subject to notice and comment procedures because "[w]hile the very nature of the Target Industries Program is to 'classify' industries according to set 'standards', the program is not a 'rule' because it is an internal policy or procedure not having the force of law."⁸⁴

Distinctions between and among legislative rules on the one hand and internal policy standards and interpretive rules on the other have often been problematic.⁸⁵ Whether notice and comment opportunity should have been required often depends upon a court's determination whether the rule or policy has a substantial impact on the affected party.⁸⁶ While the immediate legal force of the IOSHA inspection classification program and its practical impact is not as unequivocal as in other sorts of claimed internal policies,⁸⁷ and while the burden of notice and comment procedures might be substantial, there is a case to be made for requiring such procedures.

It is clear that the precise provisions of the inspection program affect most employers' likelihood of inspection and potential civil liability. There is no "full-blown hearing" prior to the issuance of the search warrant.⁸⁸ The decisive question should therefore be whether it is reasonable to suppose that requiring notice and comment procedures would be likely to result in significant refinement and improvement of the classification system and inspection criteria, but this is obviously a difficult question to answer on appeal in a given case.

Finally, the targeted business in *Frank Foundries* sought to quash the administrative search warrant on res judicata grounds. Apparently, a previous search warrant sought by the Commissioner of Labor on March 4, 1980 to search for IOSHA violations had been quashed without appeal.⁸⁹ This ingenious argument fell as the court recognized that the inspection program at issue plainly contemplates the possibility that

⁸⁴448 N.E.2d at 1092. The court of appeals cited *In re Stoddard Lumber Co.*, 627 F.2d 984, 986-88 (9th Cir. 1980) in this context.

⁸⁵See, e.g., Note, *The Interpretive Rule Exemption: A Definitional Approach to Its Application*, 15 IND. L. REV. 875 (1982). See also *Allied Van Lines, Inc. v. ICC*, 708 F.2d 297, 300-01 (7th Cir. 1983); Comment, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, 43 U. CHI. L. REV. 430 (1976).

⁸⁶See, e.g., *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972); *Herron v. Heckler*, 576 F. Supp. 218, 232 (N.D. Cal. 1983).

⁸⁷See *Mugg v. Stanton*, 454 N.E.2d 867 (Ind. Ct. App. 1983), also decided during the past survey period, in which an oral policy of not providing for transportation expense allowances for persons enrolled in four year college programs was found to be void and unenforceable as not having been duly promulgated in accordance with Indiana Code section 4-22-2-2 (1982). 454 N.E.2d at 870.

⁸⁸*J & P Custom Plating*, 458 N.E.2d at 1167.

⁸⁹*Frank Foundries*, 448 N.E.2d at 1094.

targeted businesses could face yearly inspections,⁹⁰ and that to hold otherwise would jeopardize the program's purposes.

E. Standing

In *Bethlehem Steel Corp. v. United States Environmental Protection Agency*,⁹¹ the Seventh Circuit was confronted with an issue of standing as well as the substantive question, referred to by Judge Posner as one of first impression,⁹² whether the Environmental Protection Agency (EPA) is authorized to modify the status of an air quality control region from "unclassifiable" to that of "nonattainment" at a time several years after its official designation by the EPA as unclassifiable.

Originally, the state of Indiana had designated Porter County as unclassifiable on the basis of available information, and the EPA had confirmed this designation in a listing promulgated in 1978. Four years later, the EPA reclassified a portion of Porter County including the Burns Harbor Works of Bethlehem Steel as a nonattainment area with regard to particulate matter air pollution standards. Indiana was given one year to submit plans for reaching attainment status within three-and-one-half years after approval of the new plans by the EPA.⁹³

The Seventh Circuit first determined that the EPA's order in this instance bore the requisite degree of finality in that such a reclassification "triggers definite and grave consequences."⁹⁴ Bethlehem Steel had standing as an injured party since, as the major pollutant source within the area concerned, it would undoubtedly be required by the State of Indiana to reduce its particulate emissions in compliance with the EPA order.⁹⁵

While standing is often thought of as requiring a showing that the threatened injury be not only substantial but direct,⁹⁶ the prudential element of standing here was properly emphasized.⁹⁷ The predictable impact on Bethlehem Steel was no less serious and no more diffusely shared for being indirect. In a comparable Indiana Supreme Court case⁹⁸

⁹⁰*Id.* at 1094, 1091 n.1.

⁹¹723 F.2d 1303 (7th Cir. 1983).

⁹²*Id.* at 1305.

⁹³*Id.* at 1305-06.

⁹⁴*Id.* at 1306.

⁹⁵*Id.*

⁹⁶See *Marsym Dev. Corp. v. Winchester Economic Dev. Comm'n*, 457 N.E.2d 542, 544 (Ind. 1984) (Hunter, J., dissenting to denial of transfer), also decided within the past survey period.

⁹⁷See *id.* at 543 (Hunter, J., dissenting to denial of transfer).

⁹⁸*Indiana Air Pollution Control Bd. v. City of Richmond*, 457 N.E.2d 204 (Ind. 1983). In *Richmond*, the Indiana Supreme Court vacated the decision of the court of appeals and affirmed the trial court's entry of summary judgment in favor of the City of Richmond, holding that the Air Pollution Control Board was required to make determinations of air quality standards violations through adjudication under the AAA, and not through unauthorized rulemaking procedures.

also decided within the past survey period, the court concluded that "the . . . assertion that such a classification is harmful may not be such a remote and speculative proposition, particularly where . . . the geographical area is small and the city-owned electric company may be the only possible violator of the pollution standards."⁹⁹

On the substantive issue, the Seventh Circuit interpreted 42 U.S.C. § 7407(d) and its legislative history to limit any modifications by the EPA of the state's classifications to a period expiring sixty days after the state's submission of its classifications to EPA. While the court of appeals recognized that the effect of this interpretation was to freeze classifications based upon incomplete 1977 information, it observed that the EPA was not without other instruments in mandating environmental quality improvements.¹⁰⁰

While the court was apparently correct in asserting that the precise issue had not been previously decided, it had a certain measure of available guidance contrary to its own holding. The Fifth Circuit had, in a somewhat different context, stated that "[w]e . . . read § 7407(d)(4) as saying that after February 3, 1978, an unclassified area will be deemed a § 7407(d)(1)(D) [unclassified] area until an effective designation is made. Thus it is no bar to EPA redesignation on remand."¹⁰¹

F. Social Security Disability and Substantial Evidence

The federal district court in *Adams v. Heckler* adopted an unusually strong version of the familiar rule that in social security disability benefit cases the opinions of physicians who have treated the claimant on a continuing basis are ordinarily to be accorded greater weight than those of government consulting physicians with a more limited opportunity to examine the claimant.¹⁰² In this case, the claimant sought to avoid the termination of his disability benefits by submitting the reports of his two treating physicians. One such physician had reported his opinion that the claimant was unable to perform manual labor for medical reasons, and was not educated or trained in sedentary work. He sub-

⁹⁹*Id.* at 207.

¹⁰⁰723 F.2d at 1308-09 (citing 42 U.S.C. § 7410 (c)(1)(C) (1976 & Supp. V 1981)). The urgency, from an environmentalist's standpoint, of the EPA's availing itself of this remedy was heightened during the past survey period by the Seventh Circuit's decision giving effect to an Indiana state court's decision invalidating, on state procedural grounds, the Indiana air pollution control plan that had been approved by the EPA under 42 U.S.C. § 7410. See *Sierra Club v. Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145 (7th Cir. 1983) (giving effect to *Indiana Envtl. Management Bd. v. Indiana-Kentucky Elec. Corp.*, 181 Ind. App. 570, 393 N.E.2d 213 (1979)).

¹⁰¹*United States Steel Corp. v. United States EPA*, 595 F.2d 207, 214 n.14 (5th Cir. 1979). See also *McIlwain v. Hayes*, 530 F. Supp. 973, 977 (D.D.C. 1981) (generally supporting the analysis in *U.S. Steel* in the context of an FDA color additive list).

¹⁰²580 F. Supp. 315 (N.D. Ind. 1984).

sequently offered his legal conclusion that the claimant was permanently and totally disabled, and that the claimant “was unable to sit, stand or walk for any significant amount of time without pain.”¹⁰³ The second physician, who had admittedly not examined the claimant from 1977 to a period about five months prior to the Administrative Law Judge’s (ALJ) *de novo* determination of the case, presented his opinion that the claimant would be unable to do even sedentary work.¹⁰⁴ The only evidence contrary was “the portion of the government consultants’ reports stating plaintiff could do sedentary work.”¹⁰⁵ In concluding that substantial evidence was lacking to support the Secretary’s termination of benefits, the court held that “in the present case, [the treating physicians’] conclusions that Mr. Adams is totally and permanently disabled due to his back injuries must, as a matter of law, be given the greatest weight.”¹⁰⁶ Even more strongly, the court declared that “[t]he ALJ and the Appeals Council reached their decisions only by ignoring [a treating physician’s] opinions and relying solely upon the one-time, government-paid medical consultant. Under the great weight of authority, this constitutes error as a matter of law.”¹⁰⁷

While it is certainly true that probative evidence may not be “ignored,” the formulation adopted by the court in this instance is unusually strong and seems inconsistent with controlling Seventh Circuit precedent. In a prior Seventh Circuit case,¹⁰⁸ the court of appeals reported that the claimant

Cummins particularly complains of the ALJ’s refusal to defer to the judgment of Cummins’ personal physician. It is true that this physician had examined Cummins more extensively than anyone else; but as Cummins’ personal physician he might have been leaning over backwards to support the application for disability benefits; therefore the fact that he had greater knowledge of Cummins’ medical condition was not entitled to controlling weight.¹⁰⁹

The Seventh Circuit has subsequently discussed this quoted language in such a way as to place it in its regulatory context, but without supporting the extreme formulation in *Adams*.¹¹⁰ Under the most recent, and not particularly helpful, Seventh Circuit language, “[i]f the ALJ concludes

¹⁰³*Id.* at 317.

¹⁰⁴*Id.*

¹⁰⁵*Id.* at 318.

¹⁰⁶*Id.* at 320.

¹⁰⁷*Id.*

¹⁰⁸*See* Cummins v. Schweiker, 670 F.2d 81 (7th Cir. 1982).

¹⁰⁹*Id.* at 84. *See also* Brownnton v. Heckler, 571 F. Supp. 140, 143 (N.D. Cal. 1983).

¹¹⁰*See* Whitney v. Schweiker, 695 F.2d 784, 788-89 (7th Cir. 1982). *See also* Prill v. Schweiker, 546 F. Supp. 1381, 1388-89 (N.D. Ill. 1982); Carter v. Schweiker, 535 F. Supp. 195, 203-04 (S.D. Ill. 1982).

that a treating physician's evidence is credible . . . he should give it controlling weight in the absence of evidence to the contrary. . . ."¹¹¹

G. Social Security Remand Standards

During the past survey period, the case of *Czubala v. Heckler*¹¹² was the occasion for an unusually thorough discussion of the post-1980 standards for a social security disability claimant's obtaining a remand to the Secretary on grounds of new evidence.¹¹³ In *Czubala*, the Secretary had determined that the claimant was disabled from 1975 to 1977, but not thereafter.¹¹⁴ In arguing for remand to hear new and substantial evidence, the claimant pointed to an affidavit from his mother testifying to the claimant's posthearing hospitalization.¹¹⁵

In ordering a remand to consider a portion of the claimant's proffered new evidence, the court adopted relatively stringent standards for interpreting the remand statute. The court apparently required not only that the evidence be new, in the sense that it could not have been timely proffered, but that the evidence be new "on its face," or by its date.¹¹⁶ The new evidence was also required to be new in the sense of being not repetitious or cumulative.¹¹⁷ Further, the evidence must be relevant, probative, and material in the sense of bearing a "nexus" to the original claim and being such as to generate a reasonable possibility of a change in the Secretary's original determination.¹¹⁸ New but nonmaterial evidence may of course be of value to a claimant in creating the basis for an independent new claim of disability.

Other decisions interpreting the post-1980 remand standard for new evidence reception have at least occasionally been more liberal in not requiring "facial" newness, and in being somewhat less fastidious in requiring a showing of good cause for the claimant's failure to originally introduce the evidence.¹¹⁹ It has been said, in accordance with the broad reading owed the Act,¹²⁰ that "[t]he good cause requirement often is

¹¹¹*Whitney v. Schweiker*, 695 F.2d 784, 789 (7th Cir. 1982).

¹¹²574 F. Supp. 890 (N.D. Ind. 1983).

¹¹³See 42 U.S.C. § 405(g) (1982). The amendment at issue was Pub. L. No. 96-265, § 307, 94 Stat. 458 (1980). See also S. REP. NO. 408, 96th Cong., 1st Sess. 58-59, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 1336-37.

¹¹⁴574 F. Supp. at 892.

¹¹⁵*Id.* at 899 n.4.

¹¹⁶*Id.* at 898-99. Whether parol evidence would ever be available to show the prior unavailability of "new" evidence may be further discussed in subsequent cases.

¹¹⁷*Id.* at 899.

¹¹⁸*Id.* at 899-901. A similar standard was subsequently imposed in *Newhouse v. Heckler*, 580 F. Supp. 1101, 1103 (E.D. Pa. 1984), and in *McNeil v. Heckler*, 577 F. Supp. 212, 213 (D. Mass. 1983).

¹¹⁹See, e.g., *Burton v. Heckler*, 724 F.2d 1415, 1417-18 (9th Cir. 1984). See also *Reynolds v. Heckler*, 570 F. Supp. 1064, 1067 (D. Ariz. 1983).

¹²⁰See, e.g., *Curtis v. Heckler*, 579 F. Supp. 1026, 1028 (E.D. Tex. 1984).

liberally applied, where . . . there is no indication that a remand for consideration of new evidence will result in prejudice to the Secretary.”¹²¹ The counterweight to this liberality, however, must be recognition of the congressional intent to limit the authority of courts to remand unsatisfying decisions, and to inhibit claimants from withholding available evidence in hopes of a second chance if their claim is administratively denied.¹²²

¹²¹Burton v. Heckler, 724 F.2d 1415, 1417-18 (9th Cir. 1984) (citation omitted).

¹²²See, e.g., Willis v. Secretary of HHS, 727 F.2d 551, 553-54 (6th Cir. 1984) (per curiam); Mongeur v. Heckler, 722 F.2d 1033, 1038 (2d Cir. 1983). A number of Indiana-based medicare reimbursement cases were also decided during the past survey period. Among these were Community Hosp. of Indianapolis, Inc. v. Schweiker, 717 F.2d 372, 375 (7th Cir. 1983) (medicare reimbursement level for hospital's rehabilitation center properly set at level of special, rather than routine, care units under plain meaning of regulations effective for 1977 and 1978); St. Francis Hosp. Center v. Heckler, 714 F.2d 872, 875 (7th Cir. 1983) (per curiam), *cert. denied*, 104 S. Ct. 1274 (1984) (congressional intent not to allow medicare reimbursement for nonproprietary hospitals' return on equity capital; no fifth amendment violation in voluntary scheme implementing such intention), *cited in* Sun Towers, Inc. v. Heckler, 725 F.2d 315, 335 (5th Cir. 1984); Johnson County Memorial Hosp. v. Heckler, 572 F. Supp. 1538, 1540-41 (S.D. Ind. 1983) (delegation of Secretary's authority to review decisions of Provider Reimbursement Review Board to administrator and then to deputy administrator of Health Care Financing Administration not improper); St. Joseph Hosp. v. Heckler, 570 F. Supp. 434, 440 (N.D. Ind. 1983) ("Under the *Vermont Yankee* doctrine, as applied to the APA scheme for an exempt 'benefit' regulation, the requirement of a sufficient contemporaneous statement of justification does not apply to a regulation not subject to 5 U.S.C. § 553, such as the patient telephone regulation.") (upholding validity of 1966 regulation disallowing medicare reimbursement for bedside telephones), *cited with approval in* Bedford County Gen. Hosp. v. Heckler, 574 F. Supp. 943, 945-46 (E.D. Tenn. 1983).

Also decided during the survey period were McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983) which provided some interesting dicta on the unresolved issue of equitable estoppel against the government, a theme picked up in Heckler v. Community Health Services of Crawford, 104 S. Ct. 2218 (1984); Frey v. Review Bd. of the Ind. Employment Sec. Div., 446 N.E.2d 1341, 1344 (Ind. Ct. App. 1983) (finding adequate preservation for appellate review of the legal issue that mere fact of college attendance does not as a matter of law classify an unemployment compensation claimant as unavailable for work), and Fruehauf Corp. v. Review Bd. of the Ind. Employment Sec. Div., 448 N.E.2d 1193, 1196-97 (Ind. Ct. App. 1983) (finding an abuse of discretion in the Board's refusal to hear additional evidence where an intervening holiday had prevented the employer from receiving prior notice of the hearing).

II. Business Associations

PAUL J. GALANTI*

A. Partnership Liability for Punitive Damages

Two related cases decided during the survey period, *Husted v. McCloud*¹ and *Husted v. Gwin*,² should be of special interest to attorneys who represent partnerships and, even more so, to those who practice in partnerships. Both cases involved the propriety of awarding damages against a partnership and the estate of a deceased partner for the wrongful acts of the surviving partner,³ an attorney guilty of converting client funds to his own use.⁴

The court of appeals' decision in *McCloud*,⁵ affirming the award of compensatory and punitive damages against the defendant attorney and the partnership, has been the subject of some criticism.⁶ Admittedly it was a close case, with the line between liability and nonliability a difficult one to draw. It is submitted, however, that the court of appeals' decision in *McCloud* properly construed the Indiana Uniform Partnership Act⁷ and properly applied general principles of agency law.

There were three issues presented to the Indiana Supreme Court in *McCloud*. First, whether it was proper to award punitive damages against an individual defendant attorney for his admittedly criminal acts;⁸ second, whether it was proper to award punitive damages against his partnership; and third, whether that partnership should be held liable for compensatory damages.⁹

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¹450 N.E.2d 491 (Ind. 1983) (vacating 436 N.E.2d 341 (Ind. Ct. App. 1982)).

²446 N.E.2d 1361 (Ind. Ct. App. 1983).

³It is not absolutely clear if the award in *Gwin* represented compensatory or punitive damages. However, in comparing the amount of the award, \$80,000, to the amount wrongfully converted by the attorney, \$59,295.56, it appears that the award was primarily compensatory. *Id.* at 1362. If the award did represent punitive damages, it would be in error in light of the subsequently decided *McCloud* case. See 450 N.E.2d 491 (Ind. 1983). See also *infra* notes 5-48 and accompanying text.

⁴The action in *McCloud* was brought by an executor alleging the conversion of estate funds. 450 N.E.2d at 492. The funds converted in *Gwin* were the balance of proceeds remaining from the sale of a farm in execution of a judgment. 446 N.E.2d at 1362.

⁵436 N.E.2d 341 (Ind. Ct. App. 1982).

⁶Jackson, *Professional Responsibility, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 265, 279-82 (1982).

⁷IND. CODE §§ 23-4-1-1 to -43 (1982).

⁸The individual defendant was convicted and imprisoned for his misconduct in handling clients' funds pursuant to a plea bargain. 450 N.E.2d at 493.

⁹*Id.* at 492. See also 436 N.E.2d at 344.

The first issue involved the application of the doctrine of *Taber v. Hutson*.¹⁰ The *Taber* doctrine precludes punitive damages against a defendant who is, or may be, subject to criminal prosecution for the same act. Recognizing that "the awarding of punitive damages in Indiana is discretionary,"¹¹ the court of appeals in *McCloud* "resolved" the *Taber* issue by declining to rule that the award of punitive damages against the defendant was an abuse of the trial court's discretion.¹²

The supreme court did not discuss the *Taber* issue to any extent. Rather, it merely recited the details of the written plea agreement, and noted that in sentencing Husted, the *McCloud* matter had apparently been considered by the trial court.¹³ The supreme court found punitive damages inappropriate because "[t]he public interest in punishing Husted and in deterring him from such misconduct was fully satisfied by the sentence [he] received."¹⁴ Therefore, the court held punitive damages were inappropriate. The court manifested its unwillingness to reconsider the *Taber* doctrine by simply citing *Taber* without discussing the wisdom of its holding.¹⁵

It is possible that the court was exhibiting its reluctance to award punitive damages in a civil suit.¹⁶ More convincing, however, is the possibility that the reference to "public interest" reflects the court's concern that tort defendants not be overpunished. Unlike many cases involving the *Taber* issue, Husted was in fact imprisoned. Arguably then, the court considered the quantum, rather than the number, of punishments, expressing concern that tort defendants not be punished to excess, particularly where they have been sentenced to prison.¹⁷

¹⁰5 Ind. 322 (1854).

¹¹436 N.E.2d at 346 (citation omitted).

¹²*Id.* Instead, the court of appeals relied on *Smith v. Mills*, 385 N.E.2d 1205 (Ind. Ct. App. 1979). *Smith* held that punitive damages were allowed where the defendant was not subject to criminal charges for that act. The defendant in *Smith*, similar to Husted, had entered a plea bargaining agreement with the prosecutor, which prevented the State from punishing Smith for the alleged act in question. *Id.* at 1207. Further, the court of appeals in *McCloud* declined to require a finding that an award of punitive damages would serve the public interest, and rejected Husted's contention that *McCloud* was estopped from recovering such damages. 436 N.E.2d at 345-46.

¹³450 N.E.2d at 493.

¹⁴*Id.*

¹⁵For a recent discussion of the *Taber* rule, see Note, *Double Jeopardy and the Rule Against Punitive Damages of Taber v. Hutson*, 13 IND. L. REV. 999 (1980).

¹⁶See generally Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158 (1966).

¹⁷Such an approach has been recommended as striking "the most equitable balance between the individual's interest in protection against multiple punishment and society's interest in regulating undesirable conduct." Note, *supra* note 15, at 1020.

The *Taber* issue was mooted to a substantial degree by legislation adopted during the 1984 session of the Indiana General Assembly. IND. CODE § 34-4-30-2 (Supp. 1984). This section provides that "[i]t is not a defense to an action for punitive damages that the

The second issue resolved by the *McCloud* court was the propriety of awarding punitive damages against the partnership. The court could have easily disposed of this issue by ruling that because Husted was not liable for punitive damages, the partnership itself could not be liable under section 13 of the Indiana Uniform Partnership Act (Act).¹⁸ This section of the Act binds a partnership for the wrongful acts or omissions of a partner within the ordinary course of business of the partnership. Yet the court did not take this route. Rather, it held that Husted's receipt of the funds to settle the McCloud estate was within the course of the law firm's business.¹⁹ Thus, pursuant to section 14 of the Act,²⁰ the firm was responsible to make good the loss suffered by McCloud, thus compelling the payment of compensatory damages.²¹ The court did conclude, however, that the conversion of funds which would (or could but for *Taber*) justify punitive damages was outside of the *ordinary course* of the partnership's business; thus, no liability could attach to the partnership for punitive damages.²²

It is superficially appealing to relieve an innocent partner of liability from punitive damages for another partner's wrongdoing.²³ The position

defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action." *Id.* However, a plaintiff cannot recover both punitive damages *and* treble damages for damages to property pursuant to the section of that chapter. *Id.* § 34-4-30-1. Section 2 does not contain any restrictive language, and thus it does not appear to be limited to punitive damage suits for offenses against property, even though section 1 does relate solely to such offenses. Furthermore, a showing of clear and convincing evidence is now required to support punitive damages in any civil action. IND. CODE §§ 34-4-34-1 to -2 (Supp. 1984).

¹⁸IND. CODE § 23-4-1-13 (1982) (This section binds the partnership to a partner's wrongful act and holds the partnership liable to the same extent as the partner committing the wrongful acts.). *See generally* 2 Z. CAVITCH, BUSINESS ORGANIZATIONS § 24.02 (1984); J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP § 54 (1968) [hereinafter cited as CRANE & BROMBERG]; H. REUSCHLEIN & W. GREGORY, AGENCY & PARTNERSHIP § 203 (1979) [hereinafter cited as REUSCHLEIN & GREGORY].

¹⁹450 N.E.2d at 494.

²⁰IND. CODE § 23-4-1-14 (1982) (binding a partnership for a partner's breach of trust).

²¹Thus, the *McCord* court rather summarily, but correctly, resolved the third issue by holding the partnership liable for the funds converted by Husted. 450 N.E.2d at 494.

²²*Id.* at 494-95.

²³A court may be reluctant to impose penal liability on partners for acts not expressly authorized by them, *see* *Blau v. Lehman*, 368 U.S. 403 (1962), but there is authority for imposing criminal and penal sanctions on a partnership and innocent copartners for the wrongful acts of a partner. *See, e.g., Ex parte Casperson*, 69 Cal. App. 2d 496, 159 P.2d 88 (1945); *State v. O'Kelley*, 258 Mo. 345, 167 S.W. 980 (1914). However, some courts require a showing of guilty knowledge on the part of partners before the conviction of a partnership for a criminal act can be used to punish the individual partners. *See* *United States v. A. & P. Trucking Co.*, 358 U.S. 121 (1958). *See also* *United States v. Ward*, 168 F.2d 226 (3rd Cir. 1948); *United States v. Quinn*, 141 F. Supp. 622 (S.D.N.Y. 1956).

taken by the *McCloud* court, however, cuts against one of the major premises underlying vicarious liability and agency law principles: that the principal who is in a position to exercise some degree of control over an agent²⁴ can be liable to a third party if that agent commits a wrong while acting within the scope of his authority.²⁵ The key factor in determining the liability of a principal is the scope of the agent's authority; for a partnership, the corollary is the scope of the partnership's business. It goes without saying that intentional torts are more likely to be outside of an agent's authority, or outside the scope of a partnership's business, than are negligent torts.²⁶ However, this does not mean that intentional torts, including those that might result in punitive damages, can never be within the ordinary course of a partnership's business.

The line between what is within and what is without the ordinary course of business is not an easy one to draw. The primary factor appears to be the nexus between the questioned act and the purpose of the partnership.²⁷ Thus, it might be said that an attorney driving his own car from the office to the court is not involved in partnership business since the manner in which a partner gets about is his own affair.²⁸ The attorney in court, however, or the attorney handling an estate which the partnership was retained to probate, is engaged in partnership business. Therefore, the partnership should be liable for the misfeasance and malfeasance of the partner if a nexus exists between the wrongful act and the matter for which the firm was retained. If Husted had intentionally struck McCloud with his car out of a fit of pique, the firm should not be liable for punitive damages. But where, as here, funds belonging to a client are given to an attorney in connection with a matter which the firm is handling, and then later embezzled, the firm should be subject to punitive damages, depending of course on the

²⁴Under the Indiana Uniform Partnership Act, partners are agents of the partnership with regard to partnership business, IND. CODE § 23-4-1-9(1) (1982). See also CRANE & BROMBERG, *supra* note 18, § 49.

²⁵RESTATEMENT (SECOND) OF AGENCY § 219 (1958). The "agent" in this context is generally that species of agents known as "servants." *Id.* However, a principal may be liable for the torts of nonservant agents, particularly when the element of deceit is involved. *Id.* §§ 256-61. See W. PROSSER & W. KEETON, HANDBOOK OF THE LAW OF TORTS § 70, at 508 (5th ed. 1984).

²⁶RESTATEMENT (SECOND) OF AGENCY § 235 (1958). It is settled that in certain cases, particularly those involving servants in a managerial capacity, a principal can be subjected to punitive damages. *Id.* § 217C. The nature of the principal-agent relationship in a partnership would fit within this rule because partners are in effect principals and agents at the same time. IND. CODE §§ 23-4-1-9, -18 (1982). See *Fitzgerald v. Edelen*, 623 P.2d 418 (Colo. Ct. App. 1980); *American Nat'l Bank & Trust Co. v. First Wisconsin Mortgage Trust*, 577 S.W.2d 312 (Tex. Civ. App. 1979).

²⁷See CRANE & BROMBERG, *supra* note 18, §§ 49, 54.

²⁸CRANE & BROMBERG, *supra* note 18, § 54, at 309 n.92.

state of the *Taber* doctrine and the reprehensibleness of the attorney's conduct.

The common law was reluctant to impose liability on a partner who did not authorize, participate, or ratify the wrongful act giving rise to punitive damages.²⁹ Professors Crane and Bromberg, however, state that if, under section 13 of the Uniform Partnership Act,³⁰ "the partnership is liable to the same extent as the guilty partner, and punitive damages are recoverable against him, it would seem to follow that punitive damages would be recoverable against the partnership, regardless of the innocence of other partners."³¹

Following this line of reasoning, the court of appeals in *Husted* determined, that once an individual partner is held liable for conduct deemed within the ordinary course of the partnership business, the partnership is also liable for damages flowing from such conduct, regardless of the other partners' knowledge.³² Furthermore, section 13 of the Indiana Act binds the partnership for any "loss or injury . . . caused . . ., or any penalty [that] is incurred, [by a partner]."³³ Therefore, the court of appeals' interpretation of the Act as imposing punitive damages on the law firm cannot fairly be deemed as "somewhat strained."³⁴ Indeed, a more reasonable interpretation of the provision would recognize

²⁹See CRANE & BROMBERG, *supra* note 18, § 54, at 317-18 nn. 42-45.

³⁰Codified in Indiana at IND. CODE § 23-4-1-13 (1982).

³¹CRANE & BROMBERG, *supra* note 18, § 54, at 317 (footnote omitted). The author of an annotation on the derivative liability of partners for punitive damages footnotes section 13 after referring to the general rule of nonliability for punitive damages, but states that the applicability of the provision to liability of a partner for punitive damages has not been judicially determined. Annot., 14 A.L.R. 4TH 1315, 1336 n.6 (1982).

³²*Husted v. McCloud*, 436 N.E.2d at 347.

³³IND. CODE § 23-4-1-13 (1982).

³⁴At least one author has, however, found the court of appeals' decision "somewhat strained." Jackson, *supra* note 6, at 281-82.

The *Husted* court grasps the "any penalty" language as a basis for the imposition of punitive damages against the partnership. However, this language clearly does not refer to a penalty incurred by a *partner* due to his wrongful act or omission, but to a penalty incurred by any person, *not a partner in the partnership*.

Id. at 281.

If wrongful acts or omissions of a partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, cause "loss or injury . . . to any person, not being a partner in the partnership, or any penalty is incurred," IND. CODE § 23-4-1-13 (1982), section 13 imposes liability on a partnership . . . "to the same extent as the partner so acting or omitting to act." *Id.* The basis for Jackson's assertion is that the "any penalty" language in the statute refers to a penalty incurred by "any person, *not a partner in the partnership*." Jackson, *supra* note 6, at 281.

Unfortunately, this is not a grammatical reading of section 13 because the qualifying phrase "not being a partner in the partnership" is between the "loss or injury" phrase and the "penalty" phrase. If the drafters of the Act had intended the provision to apply

that it seems to contemplate that a partnership should be derivatively liable for the wrongs committed by a partner in the ordinary course of business.³⁵

It is often argued, however, that the conversion of client's funds is not usually within the ordinary course of a law firm's "business." Courts recognize this and, instead, often look to the reason for which the funds were received.³⁶ For example, if the funds were received so that they might be invested by an attorney at his discretion, it would be unlikely that this could be termed as received in the ordinary course of business.³⁷ Whereas, if funds were received in the settlement of an estate, or as proceeds from a foreclosure sale, such receipts could properly be con-

to penalties incurred by nonpartners, the provision would have been worded to impose liability for "loss or injury caused to or penalty incurred by any person not being a partner in the partnership." The phrasing of the section leads to the conclusion that the drafters contemplated the "penalty" would be incurred by the wrongfully acting partner rather than the victim. This interpretation of section 13 is supported by cases imposing statutory usury penalties on partnerships and individual partners. *See Calimpc, Inc. v. Warden*, 100 Cal. App. 2d 429, 224 P.2d 421 (195), *overruled*, *Fazzi v. Peters*, 68 Cal. 2d 590, 68 Cal. Rptr. 170, 440 P.2d 242, (1968). *See also Wright v. E-Z Finance Co.*, 267 S.W.2d 602 (Tex. Civ. App. 1954). *See generally CRANE & BROMBERG, supra* note 18, § 54(f), at 318-19 (noting that the Uniform Partnership Act imposes liability on the partnership for "any penalty . . . incurred" by a partner acting in the ordinary course of business or with the authority of his co-partnerships").

The reference in section 13 to "injury . . . to any person, not being a partner," IND. CODE § 23-4-1-13 (1982), probably was intended to allow actions against a partnership even if the offending partner had a personal immunity, and to codify the partnership's nonliability when one partner injured another. *CRANE & BROMBERG, supra* note 18, § 54(d).

³⁵The general rule at common law was that punitive damages were not recoverable from a partnership or an innocent partner. Yet some courts imposed liability in cases involving fraud in the conduct of the ordinary course of the partnership's business, wherein the copartners had neither ratified nor authorized the conduct. *See Annot.*, 14 A.L.R. 4TH 1315, 1336-38 (1982). In at least one jurisdiction that had adopted the Uniform Partnership Act, however, a partner who had neither participated in nor ratified an action was held not liable in exemplary damages for a conversion by a copartner. *Broudy-Kantor Co. v. Levin*, 135 Va. 283, 116 S.E. 677 (1923). That court's reliance on a pre-Act case denying punitive damages against an innocent partner, and its failure to mention the Act, which had been in effect for only a few years, suggests that the statute was simply overlooked. *Compare Meleskr v. Pinero Int'l Restaurant, Inc.*, 47 Md. App. 526, 424 A.2d 784 (1981) (court imposed punitive damages on an innocent partner without even discussing the Uniform Partnership Act).

³⁶*See Riley v. Larocque*, 163 Mis. 423, 297 N.Y.S. 756, 767 (N.Y. Sup. Ct. 1937). *See, e.g., Rouse v. Pollard*, 130 N.J. Eq. 204, 209, 21 A.2d 801, 804 (N.J. 1941) ("it is [not] a characteristic function of the practice of law to accept clients' money for deposit and future investment in unspecified securities at the discretion of the attorney . . ."); *Cook v. Brundidge, Fountain, Elliott & Churchill*, 533 S.W.2d 751 (Tex. 1976) (An attorney's acceptance of a check, payable to him "as Attorney for" his client, for the purpose of investing the money, presented a question of fact with respect to the required conditions for partnership liability.).

³⁷*Rouse v. Pollard*, 130 N.J. Eq. 204, 209, 21 A.2d 801, 804 (N.J. 1941).

sidered within the scope of the ordinary course of business. In *McCloud*, the converted funds were received in connection with a legal matter being handled by the Husted firm,³⁸ and therefore the finding of the court of appeals that the partnership was liable for Husted's actions is not too unreasonable.

Of course where the wrongful acts are purely personal, and have no real nexus with the partnership's business, it is appropriate to absolve the innocent partners under general principles of agency law.³⁹ However, even in those instances another possible ground for imposing liability on the partnership exists. It has been held in other jurisdictions that even where the defendant partner's actions are not considered in the ordinary course of the partnership's business, the partnership might have a duty to the plaintiff to exercise care in operating its business.⁴⁰ That is, if the firm had in any way closed its eyes to Husted's wrongdoing, it should be held liable. In both Indiana cases, it appeared that the deceased partner was aware of Husted's misconduct before it was uncovered.⁴¹ The deceased partner's failure to put an end to Husted's defalcations in *McCloud* may have justified partnership liability for punitive damages under section 13,⁴² even if the conversion of funds were found not to be within the ordinary course of the law firm's business.

The supreme court in *McCloud* did uphold the award of compensatory damages against the partnership⁴³ under section 14 of the Indiana Act.⁴⁴ If the damages awarded in *Husted v. Gwin*⁴⁵ were in fact compensatory damages rather than punitive,⁴⁶ the result in *Gwin* should stand even after *McCloud*, since it is clear the misappropriated funds resulted from legal work performed by the law firm.⁴⁷

The supreme court in *McCloud* emphasized that punitive damages

³⁸450 N.E.2d at 492.

³⁹RESTATEMENT (SECOND) OF AGENCY § 235 (1958).

⁴⁰See *Riley v. Larocque*, 163 Misc. 423, 297 N.Y.S. 756 (N.Y. Sup. Ct. 1937) (dicta); *McClay v. Kelsey Seybold Clinic*, 456 S.W. 2d 229 (Tex. Civ. App. 1970), *aff'd*, 466 S.W.2d 716 (Tex. 1971). *But see* *Richmond Guano Co. v. E.I. DuPont de Nemours & Co.*, 284 F. 803, 808, 809 (4th Cir. 1922).

⁴¹*Husted v. Gwin*, 446 N.E.2d at 1363 n.3.

⁴²IND. CODE § 23-4-1-13 (1982).

⁴³450 N.E.2d at 494.

⁴⁴IND. CODE § 23-4-1-14 (1982). This provision binds a partnership to make good the loss when partners or the partnership receive funds which are misapplied by a partner.

⁴⁵446 N.E.2d 1361 (Ind. Ct. App. 1983).

⁴⁶See *supra* note 3.

⁴⁷446 N.E.2d at 1362. See *Douglas Reservoirs Water Users Ass'n v. Maurer & Garst*, 398 P.2d 74, 77 (Wyo. 1965). The *Gwin* court relied on IND. CODE § 23-4-1-13 (1982). The supreme court's later construction of section 13, in *McCloud*, should not change the result in *Gwin* however, because in *McCloud*, the supreme court found the firm liable under IND. CODE § 23-4-1-14 (1982). 450 N.E.2d at 494.

are not meant to compensate a plaintiff, but are intended to punish a wrongdoer and to deter others.⁴⁸ This is undoubtedly true, but the court ignored an important point. By prohibiting punitive damages against a partnership and its innocent partners, the court is inviting partners to be unduly "innocent" if they have any inkling that a partner is engaged in wrongdoing. Partners would be much more inclined to police the conduct of copartners if they realized that failure to do so could result in a punitive damage judgment. As a result, such a sanction would be much more potent as a deterrent than simply subjecting the malefactor alone to punitive damage liability.

B. Appraisal Rights

One of the more interesting business cases decided during the survey period was *Perlman v. Permonite Manufacturing Co.*⁴⁹ Minority shareholders, dissenting from a corporate merger, brought this diversity action to have the value of their shares determined as of the effective date of a corporate merger.⁵⁰ One of the few reported cases⁵¹ construing the appraisal provision of the Indiana General Corporation Act,⁵² *Perlman* is an excellent primer on the factors a court will consider in appraising the shares of a closely held corporation involved in a merger or consolidation.

In *Perlman*, the plaintiffs owned 48 of the 145 issued and outstanding shares of Midland Enterprises (Midland), an Indiana corporation, which was merged along with its wholly owned subsidiary into Permonite, an Illinois corporation.⁵³ The court used the net asset value method of

⁴⁸450 N.E.2d at 495. The court observed "that the rationale behind punitive damages in Indiana prohibits awarding such damages against an individual who is personally innocent of any wrongdoing." *Id.* But cf. *Guild v. Herrick*, 51 N.Y.S.2d 326 (N.Y. Sup. Ct. 1944) (lack of knowledge is no defense when partner should have known securities were being manipulated in course of partnership business).

⁴⁹568 F. Supp. 222 (N.D. Ind. 1983), *aff'd*, 734 F.2d 1283 (7th Cir. 1984).

⁵⁰568 F. Supp. at 223.

⁵¹*See* *Republic Finance & Inv. Co. v. Fenstermaker*, 211 Ind. 251, 6 N.E.2d 541 (1937); *General Grain, Inc. v. Goodrich*, 140 Ind. App. 100, 221 N.E.2d 696 (1967).

⁵²The right to appraisal is found at IND. CODE § 23-1-5-7 (1982). This provision applies both to mergers (one or more constituent corporations merge into another constituent corporation) and to consolidations (two or more constituent companies cease to exist and a new corporation emerges from the transaction). *Id.* § 23-1-5-1. *See generally* H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* § 346 (3d ed. 1983) (discussing the differences and similarities between mergers and consolidations) [hereinafter cited as HENN & ALEXANDER]. Shareholders of a corporation selling all, or substantially all, of its assets for purposes of ending or changing the nature of its business are also entitled to have their shares appraised. IND. CODE §§ 23-1-6-1, -5 (1982).

⁵³568 F. Supp. at 223. Apparently, plaintiffs followed proper procedures in exercising their right of appraisal because no issue was raised by the defendant corporation regarding the procedures followed. A dissenting shareholder who does not follow the proper pro-

valuing Midland's shares.⁵⁴ This method assumes that on the effective date of a merger, a corporation's value equals the fair market value of its assets less the fair market value of its liabilities. Consequently, the court substituted the fair market values of Midland's assets and liabilities for their stated book values to arrive at an adjusted balance sheet.⁵⁵

The first adjustment, a downwards revision of the notes receivable held by the two companies, was made because the interest rates on the notes were substantially below the appropriate market rate. Thus, the notes' values on the date of the merger were adjusted to reflect the right to receive payment of the principal in 1985, along with an appropriate yield to maturity.⁵⁶

The value of the property, plant, and land of both Midland and its subsidiary, as of the merger date, had to be adjusted upwards to reflect increased fair market value over book value.⁵⁷ The property of the subsidiary was subsequently sold, producing an undisputed capital gains tax liability on the part of the corporation. As a result, the fair market value of this property was reduced by an amount equal to the tax liability.⁵⁸ The end result of this entire process was an adjusted balance sheet.

However, the court did not award the plaintiffs their pro rata interest in this value. Instead, it discounted the value of the shares by thirty-five percent.⁵⁹ This figure included a fifteen percent discount to the

cedures is presumed to have assented to the merger or consolidation. IND. CODE § 23-1-5-7 (1982). See *Gabhart v. Gabhart*, 267 Ind. 370, 370 N.E.2d 345 (1977).

⁵⁴568 F. Supp. at 223. Both plaintiffs' and defendants' appraisal experts used this approach. *Id.* This is not the only method available for establishing the value of dissenting shares in a merger or consolidation. See generally HENN & ALEXANDER, *supra* note 52, § 349, at 1002-03. Unfortunately, "value" is not defined in the statute, nor is any clue given as to its meaning.

⁵⁵568 F. Supp. at 223. The same process was used to determine the fair market value of Midland's wholly-owned subsidiary, a Midland asset. *Id.* Current assets and liabilities of the two corporations did not have to be adjusted. *Id.* at 224.

⁵⁶*Id.* at 224.

⁵⁷*Id.* The court considered the testimony of defendants' real estate expert to be more reliable than the testimony of plaintiffs' witness who, not surprisingly, placed a higher value on the land. *Id.* at 224-25.

⁵⁸*Id.* at 224. Presumably the tax liability would not have been considered if the property had not been on the market at the date of the merger.

⁵⁹*Id.* at 226. The court ignored the testimony of one of the plaintiffs on the value of the dissenting shares because it was contradicted by the plaintiffs' as well as defendants' experts. *Id.* The court also concluded that even if the value of the surviving corporation's shares were relevant, there was no reliable estimate as to their value. The only arm's length valuation involving these shares was an estate tax determination for one shareholder less than four months after the merger. This figure, using the merger exchange rate, resulted in a value for the Midland shares roughly the same as the value determined by the court (IRS value was \$2,265.50 per share; court determined value was \$2,849.85). *Id.* One other transaction involving shares of the surviving corporation which would have

reflect plaintiffs' minority shareholder status in a relatively small, closely held, nonpublic corporation. The value of the shares was reduced because as a minority, the dissenting shareholders did not possess the power to either force a dividend or a liquidation, or control corporate policy or operations.⁶⁰ The court then made an additional fifteen percent discount to reflect the virtual nonexistence of a market for the plaintiffs' shares.⁶¹

The court reasoned that, generally, minority shareholders are unable to sell their shares, except to the majority holders or unless the majority holders are also selling their shares. This lack of demand causes the price of shares to decrease. This factor seems questionable, however because the lack of a market should be reflected in the minority interest valuation. Finally, the court discounted the minority interest's shares an additional five percent to reflect the risk associated with holding Midland's shares because of its "size and lack of diversity."⁶²

The *Perlman* court, in applying Indiana law, analyzed the two Indiana decisions involving appraisal rights: *Republic Finance & Investment Co. v. Fenstermaker*⁶³ and *General Grain, Inc. v. Goodrich*.⁶⁴ In *Republic Finance*, dissenting shareholders of a corporation brought an action to determine the value of their shares upon the consolidation of their corporation with a constituent corporation.⁶⁵ The company appealed,

substantially increased the value of the shares was discounted by the court because: (1) it was not an arm's length transaction; and (2) it had occurred a year before the merger. *Id.* at 226, 233.

The latter transaction did help plaintiffs in one respect. One shareholder owned only one share, the value of which was substantially less than the \$10,000 diversity jurisdiction requirement. 28 U.S.C. § 1332 (1982). The court was satisfied that her claim in the complaint was made in "good faith" because the value of her share derived from this sale exceeded \$10,000. *See Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 352-54 (1961) (allowing reference to the complaint to determine the amount in controversy, unless it appears the amount was not stated in good faith). The testimony was rejected in valuing the Midland shares, but it did satisfy the requirement of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that each plaintiff individually must satisfy the jurisdictional amount. 568 F. Supp. at 227-28.

⁶⁰568 F. Supp. at 226. This is an overstatement as far as forcing dividends is concerned, as it is well settled in Indiana that a minority shareholder can force a dividend in an appropriate case. *See Cole Real Estate Corp. v. Peoples Bank & Trust Co.*, 160 Ind. App. 88, 310 N.E.2d 275 (1974), discussed in Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 35-42 (1974).

⁶¹568 F. Supp. at 226, 231-32.

⁶²*Id.* at 226. Not surprisingly, the discounts were based on testimony of defendants' stock appraisal expert. Plaintiffs' expert neither computed nor recognized a discount. *Id.* He did concede on cross-examination that such a discount would have been appropriate had he not been asked to value Midland itself. *Id.* at 232.

⁶³211 Ind. 251, 6 N.E.2d 541 (1937).

⁶⁴140 Ind. App. 100, 221 N.E.2d 696 (1966).

⁶⁵The appraisal procedures are the same for mergers and consolidations. IND. CODE § 23-1-5-7 (1982). *See supra* note 52.

arguing that the trial court had relied too heavily on the book value of the assets, ignoring the company's own estimates of value.

The supreme court held that in placing a value upon dissenting shares, a court must take into account all relevant factors and considerations. "[W]eight should be given to the following considerations: Market value of stock, actual evaluation of assets, book value of assets, going value, prospects of corporation, character of assets (frozen or liquid), earnings, and general economic conditions."⁶⁶ The *Republic Finance* court also held that the value of the dissenting shares should be determined immediately before the merger or consolidation. With that approach then, dissenting shareholders neither receive an increase in value resulting from the transaction nor are they charged with any expenses of bringing about the transaction.⁶⁷

Like *Republic Finance*, *General Grain, Inc. v. Goodrich*⁶⁸ emphasized that the ultimate issue in an appraisal proceeding is to determine the fair market value of the dissenting shares.⁶⁹ This requires consideration of a number of elements of value:

book value, liquidating value, stock market value, evidence of sales in the market, the type of market available, the condition of the issues [sic] financial, managerial, (and) past and their present, as well as future possibilities and probabilities together with all the other elements which tend to affect the fair market value, for cash⁷⁰

The court of appeals in *General Grain* considered the financial

⁶⁶211 Ind. at 254, 6 N.E.2d at 542, *quoted in* Perlman v. Permonite Mfg. Co., 568 F. Supp. 222, 228. The *Republic Finance* court also indicated that appraisals of assets and liabilities could be of greater assistance than book value or "a statement based upon arbitrary figures, such as costs and arbitrary percentage reserves." 211 Ind. at 255, 6 N.E.2d at 542. The stock market value of shares of a publicly traded corporation was helpful but not necessarily conclusive in valuing shares; in addition, the value given to both tangible and intangible assets should have been going concern value and not liquidation value unless the corporation was in financial distress and liquidation inevitable. *Id.* at 254-55, 6 N.E.2d at 542.

⁶⁷211 Ind. at 255, 6 N.E.2d at 543. In general, the approach taken in *Republic Finance* is similar to the approach other courts have taken in appraisal proceedings. *See generally* HENN & ALEXANDER, *supra* note 52, § 349, at 1002-04 nn. 12-16.

⁶⁸140 Ind. App. 100, 221 N.E.2d 696 (1966).

⁶⁹*Id.* at 109-11, 221 N.E.2d at 701.

⁷⁰*Id.* at 110, 221 N.E.2d at 701. The court was not willing to rely solely on the "market" price for valuing corporate shares, although such a price would be a factor. *Id.* at 111, 221 N.E.2d at 701-02. Departure from the market's price in determining the value of securities has occurred in other contexts. *See* Beecher v. Able, 435 F. Supp. 397, 407-09 (S.D.N.Y. 1977) (value of debentures adjusted upwards from the market price because of perceived overreaction by market to negative news in an action under § 11 of the Securities Act of 1933. 15 U.S.C. § 77k(e) (1976)). *But see* Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 585-86 (S.D.N.Y. 1971). *See generally* R. JENNINGS & H. MARSH, SECURITIES REGULATION 758-59 (5th ed. 1982).

condition of the constituent corporations, and reversed the trial court because it had overemphasized the book value of the shares when the corporation was in financial trouble.⁷¹

Republic Finance was helpful to the *Perlman* defendants. In *Perlman*, the plaintiffs' expert had considered the effect of the merger in valuing the plaintiffs' shares. Relying on *Republic Finance*,⁷² the *Perlman* court deemed this improper, and deferred to the defendants' witness, who had not considered the merger agreement in his appraisal.⁷³

At the time of the *Perlman* decision, no Indiana authority existed regarding the appropriateness of discounting the value of the plaintiffs' shares from their pro rata interest in the value of Midland.⁷⁴ The court considered and rejected the Iowa Supreme Court's decision in *Woodward v. Quigley*.⁷⁵ In *Woodward*, the Iowa court refused to apply a minority discount factor because a discount would permit a majority to force out a minority without paying them their proportionate share of the actual value of the corporation. Furthermore, *Woodward* declined to follow a line of tax cases in which the lack of a market for a minority interest was found to justify a discount.⁷⁶ The *Woodward* court reasoned that the purpose of the Iowa appraisal was to determine the "real" value of dissenting shares.⁷⁷ It was not clear what "real" value meant, but apparently the *Perlman* court was convinced that the Iowa statute reflected a policy not present in the Indiana appraisal statute.⁷⁸

Rather, *Perlman* adopted the view of *Moore v. New Ammest, Inc.*,⁷⁹ which held that Kansas law valued dissenting shares based on all relevant factors, and thus the value of a dissenter's shares was his "proportionate interest in a going concern."⁸⁰ At least this is how the *Perlman* court characterized *Moore*, even though the reference to an interest in a going concern is arguably closer to the *Woodward* rationale. Yet in discounting the dissenting shares, the Kansas court reasoned that a minority's proportionate interest in a going concern is less than a pro rata share of its assets and, therefore, discounting was appropriate.⁸¹

⁷¹140 Ind. App. at 112-13, 221 N.E.2d at 702-03.

⁷²211 Ind. 251, 6 N.E.2d 541 (1937). See *supra* note 67 and accompanying text.

⁷³568 F. Supp. at 230.

⁷⁴The court could not resist taking a dig at the attorneys when it noted that it had located two cases on point while neither party had cited any relevant case law. 568 F. Supp. at 230 (citing *Woodward v. Quigley*, 257 Iowa 1077, 133 N.W.2d 38, *modified*, 257 Iowa 1160, 136 N.W.2d 281 (1965); *Moore v. New Ammest, Inc.*, 6 Kan. App. 2d 461, 630 P.2d 167 (1981)).

⁷⁵257 Iowa 1077, 133 N.W.2d 38, *modified*, 257 Iowa 1160, 136 N.W.2d 281 (1965).

⁷⁶257 Iowa at 1087, 133 N.W.2d at 42-44.

⁷⁷*Id.* at 1087, 133 N.W.2d at 43-44.

⁷⁸IND. CODE § 23-1-5-7 (1982).

⁷⁹6 Kan. App. 2d 461, 630 P.2d 167 (1981).

⁸⁰*Id.* at 467, 630 P.2d at 173 (quoting *Tri-Continental v. Battye*, 31 Del. Ch. 523, 526, 74 A.2d 71, 72 (1950)).

⁸¹6 Kan. App. 2d at 474-75, 630 P.2d at 177. The discount would not be appropriate

There was no real discussion of the propriety of the fifteen percent discount for the nonmarketability of the Midland shares. The *Moore* rationale would apply to this factor as well; and in actuality, the court did apply a thirty percent discount, reflecting all the negatives incumbent with minority status.⁸² The defendants, however, did not prevail on all points: the court refused to allow an additional discount to reflect capital gains taxes that would become due if Midland's assets were sold.⁸³ This discount was rejected because it assumed Midland's assets would be liquidated. Such an assumption conflicted with the requirement of *Republic Finance* that assets be "valued in the context of the corporation as a going concern, unless the corporation is in distress and liquidation inevitable."⁸⁴

The final issue presented to the *Perlman* court was whether prejudgment interest on the value of the shares was proper. The court concluded it was not.⁸⁵ The Indiana appraisal statute does not expressly provide for interest. The plaintiffs argued that denying interest would be unjust to dissenting shareholders since the statute itself precludes them from participating "in dividends or in corporate management from the date of the merger."⁸⁶ Furthermore, they argued that section 7 of the statute provides that the "'practice, procedure and judgment' in stock valuation cases 'shall be the same, so far as practicable, as that under eminent domain cases.'"⁸⁷

Although the eminent domain statute now includes interest from the date of taking,⁸⁸ the court in *General Grain* found that it did not provide for interest when the General Corporation Act was adopted in 1929, and that the subsequent amendment to provide for interest was not retroactive.⁸⁹ The *General Grain* court questioned whether interest, even if authorized in case law, could be considered a part of the "practice, procedure and judgment" of the eminent domain laws, because the right was more substantive than procedural.⁹⁰ As a result, appraisal rights are

if there were a market for the corporation's shares which would reflect the minority interest. That is to say, the market value could be less than the "enterprise value" of the shares. See *Perlman v. Feldman*, 154 F. Supp. 436 (D. Conn. 1957).

⁸²Plaintiffs did not challenge the five percent discount for Midland's size and non-diverse business. 568 F. Supp. at 232.

⁸³*Id.*

⁸⁴*Id.* (citation omitted). The court did deduct the capital gains liability for the property of the Midland subsidiary which was in fact sold. *Id.* at 224.

⁸⁵*Id.* at 233-35.

⁸⁶*Id.* at 233.

⁸⁷*Id.* at 233 (quoting IND. CODE § 23-1-5-7 (1982)).

⁸⁸IND. CODE § 32-11-1-8 (1982).

⁸⁹*General Grain, Inc. v. Goodrich*, 140 Ind. App. 100, 108-09, 221 N.E.2d 696, 700 (1966).

⁹⁰*Id.* Apparently, interest had been awarded in eminent domain cases prior to the amendment to section 32-11-1-8 to satisfy just compensation requirements of the Indiana

considered like any other unliquidated claim, and dissenting shareholders are not entitled to interest until final judgment is entered.⁹¹

The *Perlman* court refused to distinguish *General Grain* on the ground that the merger there occurred before the eminent domain statute was amended.⁹² It rejected the plaintiffs' contention, concurring with the doubts of the court in *General Grain* that interest is part of the "practice, procedure and judgment" of the eminent domain laws.⁹³ The *Perlman* court found that any inequity in denying interest was a matter properly addressed by the General Assembly.⁹⁴ The statute had been amended twice since *General Grain*, without providing for postmerger interest. Thus, the *Perlman* court was satisfied that the legislature intended to let the *General Grain* interpretation stand.⁹⁵ Consequently, dissenting shareholders are not entitled to interest until final judgment is entered.⁹⁶ The *Perlman* treatment of the interest issue, while no doubt correct as a matter of law, is narrow, unfortunate, and inequitable as far as dissenting shareholders are concerned.

There is a paucity of decisions interpreting the rights of dissenting shareholders in a merger or consolidation to have the value of their shares determined. The *Perlman* decision, although somewhat harsh on the interest issue, fills in some of the interstices left by *Republic Finance* and *General Grain*.

C. "Informal" Corporate Dissolution

Practitioners who are tempted to terminate a corporation's affairs by failing to file annual reports with the Secretary of State should take note of *Duncan v. Jones*.⁹⁷ In *Duncan*, the court of appeals reversed "a summary judgment of the Hancock Circuit Court awarding one-half of a corporate bank account to [Jones, the] plaintiff,"⁹⁸ who owned half of the particular corporation. Jones brought this action against a savings and loan to collect one-half of an account, opened by Duncan

Constitution, art. I, § 21. See *Schnull v. Indianapolis Union Ry. Co.*, 190 Ind. 572, 131 N.E. 51 (1921). The *Perlman* court summarily rejected a constitutional argument for interest. 568 F. Supp. at 235 n.6.

⁹¹140 Ind. App. at 109, 221 N.E.2d at 701.

⁹²568 F. Supp. at 234.

⁹³*Id.*

⁹⁴*Id.* at 234-35.

⁹⁵*Id.*

⁹⁶140 Ind. App. at 109, 221 N.E.2d at 701.

⁹⁷450 N.E.2d 1019 (Ind. Ct. App. 1983).

⁹⁸*Id.* at 1020. The court also ordered the trial court to grant defendant financial institution's Rule 12(B)(7) motion, IND. R. TR. P. 12(B)(7), to join the corporation and the other shareholder as indispensable parties, and to grant the latter parties' petition to intervene. 450 N.E.2d at 1023.

without any corporate formalities. Only Duncan was authorized to withdraw funds from the account.⁹⁹

Jones argued that the Secretary of State had revoked the rights and privileges of the corporation, and had declared the articles of the corporation forfeited for failure to file annual reports. The Secretary of State's action alone, he contended, terminated the corporation's existence so that the bank account became divisible between the two shareholders as tenants in common.¹⁰⁰

The court of appeals, in reversing the judgment, held that under the Indiana General Corporation Act, when a corporation's articles have been forfeited for failing to file annual reports, an involuntary dissolution action by the Attorney General is required for a formal winding up of the corporation's affairs.¹⁰² Until this procedure is complete, a corporation, although in limbo with a forfeited franchise and without corporate rights and privileges, maintains sufficient status as a separate entity to preclude a collateral challenge to its existence.¹⁰³ Therefore, Jones had no claim to the corporation's assets until they had been distributed to him through proper corporate or judicial action.¹⁰⁴

The *Duncan* court appears to have reached the correct result. Yet, it is understandable how Jones could conclude, as did the trial court, that the corporation ceased to exist when the articles were administratively forfeited by the Secretary of State. The General Corporation Act provides that nothing in the corporate dissolution section is to limit the Secretary of State's authority "to revoke the rights and privileges of any corporation

⁹⁹450 N.E.2d at 1021.

¹⁰⁰*Id.* at 1020-21. See IND. CODE § 23-1-8-1 (1982) (requiring corporations to file annual reports).

¹⁰¹IND. CODE §§ 23-1-1-1 to -3-8-1 (1982).

¹⁰²450 N.E.2d at 1022. The court of appeals relied expressly on two sections of the Act to determine the existence of such a requirement. IND. CODE § 23-1-7-3 (1982) (providing for involuntary corporate dissolution by a circuit or superior court), IND. CODE § 23-1-10-1 (1982) (describing corporate forfeiture). Apparently, the forfeiture of the articles puts a corporation in some sort of purgatorial limbo. See *infra* note 103 and accompanying text.

Section 23-1-10-1(b) provides that when the Secretary of State certifies to the Attorney General that a corporation has failed to file annual reports for two consecutive years, and consequently has forfeited its corporate franchise, rights, and privileges, the Attorney General is to proceed by information against the corporation for the purpose of having the forfeiture declared. IND. CODE § 23-1-10-1(b) (1982). Section 23-1-7-3(d) provides that the existence of a corporation being involuntarily dissolved ceases when the clerk of the court causes a certified copy of the judgment or order of dissolution to be filed in the office of the Secretary of State. IND. CODE § 23-1-10-1(b) (1982).

¹⁰³See *Knotts v. Clark Constr. Co.*, 191 Ind. 354, 358, 131 N.E. 921, 922 (1921); *Barren Creek Ditching Co. v. Beck*, 99 Ind. 247, 249-50 (1884); *Logan v. Vernon R.R.*, 90 Ind. 552, 556-57 (1883); *President of Hartsville University v. Hamilton*, 34 Ind. 506, 509 (1870).

¹⁰⁴*Department of Treasury v. Crowder*, 214 Ind. 252, 15 N.E.2d 89 (1938).

to carry on and transact business, or to declare forfeit the articles of incorporation . . . for failure to file the annual report for two (2) successive years"¹⁰⁵ This provision was designed to ensure the right of the Secretary of State to act administratively against delinquent corporations. Arguably, this administrative forfeiture clause could be interpreted to mean that if the Secretary of State certifies a delinquent corporation to the Attorney General, who then brings an involuntary dissolution action, corporate existence ceases only when the court's judgment is filed with the Secretary of State; if, however, the Secretary of State does not certify the delinquency to the Attorney General, corporate existence ceases when the articles are declared forfeited by the Secretary of State. Although plausible, this argument would tend to discourage following the proper procedures for dissolving corporations.¹⁰⁶ A more reasonable interpretation is that the administrative forfeiture clause triggers another section of the General Corporation Act.¹⁰⁷ That section imposes criminal and civil liability on persons who, with intent to defraud, exercise corporate powers after a corporation has been dissolved, or its articles of incorporation canceled.¹⁰⁸

Arguably, another source of confusion is that Indiana has two separate corporate annual report statutes.¹⁰⁹ The purpose of the second statute is to require annual reports from corporations not required to file annual reports under any other Indiana act.¹¹⁰ Thus, the reporting requirements of the second statute would not apply to corporations organized under the Indiana General Corporation Act. Moreover, the statute authorizes the Secretary of State to administratively revoke the corporate franchise of domestic corporations¹¹¹ failing to file annual reports for two years. This section applies to "any domestic corporation."¹¹² In addition, the procedure for reinstating a corporation whose franchise has been revoked for failure to file an annual report is set forth in the statute.¹¹³ The statute specifies that when a corporation is reinstated, it "shall be deemed to have continuously existed since" its rights and privileges were revoked, and its articles forfeited.¹¹⁴

¹⁰⁵IND. CODE § 23-1-7-3(g) (1982).

¹⁰⁶The General Assembly has recognized that a corporation will survive to some extent even after it is dissolved. *See, e.g.*, IND. CODE § 23-1-7-3(f) (1982) (General Corporation Act authorizes a receiver of a dissolved corporation to collect and otherwise realize upon and distribute assets of the corporation not distributed prior to the dissolution.).

¹⁰⁷IND. CODE § 23-1-10-5(a) (1982).

¹⁰⁸The word "canceled" is used in IND. CODE § 23-1-10-5(a), while "forfeited" is used in IND. CODE §§ 23-1-7-3, -10-1. Yet, in context, the terms appear to be synonymous.

¹⁰⁹IND. CODE §§ 23-1-8-1; 23-3-4-1 to -2 (1982).

¹¹⁰*Id.* § 23-3-4-1.

¹¹¹*Id.* § 23-3-4-1(c).

¹¹²*Id.*

¹¹³IND. CODE § 23-3-4-1.6 (1982).

¹¹⁴*Id.* § 23-3-4-1.6(c).

The provisions of this reinstatement clause suggest a legislative lack of concern for the niceties of following dissolution procedures. The provision permitting reinstatement undercuts the argument that the conduct of a business after its articles have been forfeited could be evidence of fraudulent intent under the General Corporation Act. As a result, anyone who, despite any fraudulent intent, operated a business as a corporation after forfeiture could undo the adverse consequences simply by filing the delinquent reports. This is a possible and an unfortunate result, as it would virtually turn the penalty provision into a dead letter. It is not necessarily an inevitable result; the reinstatement provisions are intended to help those who have not filed their annual reports in a timely manner, more through inadvertence than through improper or fraudulent motives. There is no reason why the two sections (reinstatement and annual report) cannot be "harmonized."

If people involved in a corporation settle its affairs by selling its assets, paying all creditors, and distributing the balance to themselves without complying with the statutory dissolution provisions, no one is truly harmed except the state, which has lost fees that would have been paid if the proper procedures had been followed. In such a case the informal dissolution approach would not be a subject of shame, although not to be encouraged. The problem with an informal approach is that claims against the corporation might be unknown or overlooked before assets are distributed. This could subject the directors to civil and even criminal liability.¹¹⁵

It is hoped that attorneys would not intentionally dissolve corporations informally if only out of a sense of professional pride. If they do, their clients might end up like the plaintiff in *Duncan*.¹¹⁶ This is the most troublesome aspect of the case. The result in *Duncan* is correct, but a great deal of time, money, and effort was spent in the litigation which could have been avoided if the proper, *formal* procedures had been followed.

D. Partnership Liability

Often a partnership is formed when two people simply agree to enter into business together.¹¹⁷ Once partnership status is established, partners become subject to unlimited personal liability.¹¹⁸ To protect against such liability, business ventures are often carefully formed so that they do not appear to be partnerships.¹¹⁹ In *J.M. Schultz Seed Co.*

¹¹⁵IND. CODE § 23-1-10-2 (1982).

¹¹⁶450 N.E.2d 1019 (Ind. Ct. App. 1983).

¹¹⁷IND. CODE § 23-4-1-6. See generally CRANE & BROMBERG, *supra* note 18, ch. 2.

¹¹⁸IND. CODE § 23-4-1-15.

¹¹⁹See, e.g., *Martin v. Peyton*, 246 N.Y. 213, 158 N.E. 77 (1927) (finding that the relationship defendants intended to form was, as a matter of law, a partnership.).

v. Robertson,¹²⁰ however, it was a matter of luck partnership status was not found.

The court of appeals in *Schultz* affirmed a negative judgment of the Boone County Circuit Court in a creditor's suit against a putative partner for a partnership debt.¹²¹ In this case, defendant Robertson told the Schultz representative that he wanted to talk to "his partner" King before signing the note; he then signed the note as "partner."¹²² When the note was not paid, Schultz sued both Robertson and King as partners. The trial court found that no partnership existed on the date of the note, and therefore judgment was entered against Robertson. Because King had neither signed nor agreed to pay the note, he was not liable for the debt.¹²³ On appeal, Schultz argued that the evidence compelled the conclusion that Robertson and King were partners and, thus, King should be individually liable for the debt.

The central issue in *Schultz* was whether or not King and Robertson were partners at the time of the transaction. Taking note that the common law in Indiana provides no clear cut definition of a partnership, the court of appeals first turned to the Indiana Uniform Partnership Act (Act).¹²⁴ The Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."¹²⁵ Although the statute provides some guidance,¹²⁶ whether the elements of a partnership have been established is a question of fact.¹²⁷ The court of appeals, noting its limited standard of review over questions of fact, held that the trial court could legitimately conclude that King and Robertson had no intent to form a partnership at the time in question, but rather, had a debtor-creditor relationship.¹²⁸ The evidence brought forth at trial revealed that before the Schultz note was signed King had cosigned bank notes for Robertson. King had met also with Schultz

¹²⁰451 N.E.2d 62 (Ind. Ct. App. 1983).

¹²¹*Id.* at 63.

¹²²*Id.*

¹²³*Id.*

¹²⁴IND. CODE §§ 23-4-1-1 to -43. (1982). *See also* 451 N.E.2d at 64.

¹²⁵IND. CODE § 23-4-1-6.

¹²⁶Section 7 of the Act contains rules to be used in determining whether or not a partnership exists. Subsection 3 provides that the sharing of gross receipts does not "of itself" establish a partnership. IND. CODE § 23-4-1-7(3) (1982). Subsection 4 provides that receipt of a share of a business' profits is prima facie evidence of a partnership. However, this last inference is not to be drawn if the profits are received in payment of a debt, or as interest on a loan, even if payments vary with the profits of the business. IND. CODE § 23-4-1-7(4). *See also*, CRANE & BROMBERG, *supra* note 18 §§ 15, 19.

¹²⁷*Musgrave v. Madonna*, 168 Ind. App. 145, 341 N.E.2d 789 (1976). *See Vohland v. Sweet*, 433 N.E.2d 860 (Ind. Ct. App. 1982). *See generally* CRANE & BROMBERG, *supra* note 18, §§ 4(c), at 35-36; 14A, at 77. Furthermore, the burden of persuasion is on the party asserting the partnership. *Id.* at 36.

¹²⁸451 N.E.2d at 65.

representatives in an attempt to arrange a debt schedule for repaying Robertson's note. Finally, King gave Schultz his personal financial statement.¹²⁹ Robertson testified that he thought King was his partner at the time the note to Shultz was signed. King, however, considered himself a creditor until early 1980 when they filed a tax return stating they were partners.¹³⁰ King testified that "he had no voice in the management, but was consulted by Robertson on some major decisions."¹³¹ No written or oral partnership agreement had been agreed to, nor was any agreement even discussed until 1980. Furthermore, no agreement to share profits had been entered into.

Regardless of the truth of King's statements, none of them actually precluded the existence of a partnership. Although King might have had no voice in the management of the business, there is no need to show daily involvement by a partner to establish a partnership.¹³² The key is the objective intent of the parties, inferred from their actions.¹³³

A partnership is a consensual relationship, but there is no need for an express contract, oral or written.¹³⁴ If an agreement is required, it may be express or implied.¹³⁵ It is even possible for a partnership relationship to exist when the parties believe that they are not partners.¹³⁶

Profit sharing is a primary attribute of the co-ownership element of a partnership.¹³⁷ However, an express agreement between partners to share profits is unnecessary,¹³⁸ because silence as to how profits are to be shared simply leads to the conclusion that they are to be shared equally.¹³⁹ Presumably, in most partnerships, partners expect to make a profit, and have some thoughts as to how such profits are to be divided. Yet in a case such as *Schultz*, where the business was losing money when King became a putative partner, such a presumption might not

¹²⁹*Id.* at 63. All contact between Schultz and King occurred after the chemicals were sold, so Schultz did not rely on his credit in making the sale. *Id.* See *infra* text accompanying notes 144-47.

¹³⁰451 N.E.2d at 64. Robertson borrowed money from King and placed it in a capital account on his books, but King carried the loans as notes receivable until they decided to treat the venture as a partnership for tax deduction purposes. *Id.*

¹³¹*Id.* at 64.

¹³²See *Vohland v. Sweet*, 433 N.E.2d 860, 864 (Ind. Ct. App. 1982); *Endsley v. Game-Show Placements, Ltd.*, 401 N.E.2d 768, 770-71 (Ind. Ct. App. 1980).

¹³³*Cf.* RESTATEMENT (SECOND) OF AGENCY §§ 1, 15, 26 (1957).

¹³⁴See CRANE & BROMBERG, *supra* note 18, § 5(b), at 42-43.

¹³⁵*Kavanaugh v. England*, 232 Ind. 54, 58, 110 N.E.2d 329, 331 (1953); CRANE & BROMBERG, *supra* note 18, § 5(b).

¹³⁶See CRANE & BROMBERG, *supra* note 18, § 5(a), at 41-42 n.46.

¹³⁷IND. CODE § 23-4-1-7(4) (1982); See generally CRANE & BROMBERG, *supra* note 18, §§ 14, 14A.

¹³⁸CRANE & BROMBERG, *supra* note 18, § 65(a), at 366.

¹³⁹*Id.*

exist.¹⁴⁰ Thus, the fact that the defendants did not agree to share profits does not lead inevitably to the conclusion that no partnership existed.

However, as the court pointed out, it could reverse the decision below only if the evidence led solely to the conclusion that there was a partnership.¹⁴¹ The court of appeals noted that the federal income tax return filed by King and Robertson could be evidence of a partnership,¹⁴² but the trial court could just as easily have considered the return, and Robertson's treatment of King's loan as a capital account, as an effort "to credit losses against other income."¹⁴³ In other words, it was possible to conclude, as did the trial court, that Robertson and King had a debtor-creditor relationship and thus were not partners. Schultz' argument of a partnership by estoppel was also rejected by the court.¹⁴⁴ The Indiana Act provides that a person can be liable if he is simply held out as a partner.¹⁴⁵ If the representation is private, only the persons to whom it was made may benefit; if the representation is public, generally anyone can rely on it, even if it is not made or communicated to them.¹⁴⁶ Here, there was no evidence that Schultz was aware of King when the chemicals were sold or the note signed; thus, Schultz could not be said to have relied on the existence of King as a partner.¹⁴⁷ Because estoppel requires a holding out and a reliance, Schultz's argument was rejected.

Schultz reached an eminently reasonable result.¹⁴⁸ Because the burden of persuasion is on the party asserting the existence of the partnership, the decision should be that a partnership does not exist if the evidence of intent is evenly balanced, as was the case here. It is interesting to note, however, that arguably the judgment would have been affirmed, even if the trial court had found for Schultz.

¹⁴⁰Generally, there is no requirement that the parties agree to share losses; loss sharing is regarded as a consequence of partnership. CRANE & BROMBERG, *supra* note 18, § 14(e).

¹⁴¹Vohland v. Sweet, 433 N.E.2d 860, 865 (Ind. Ct. App. 1982).

¹⁴²Guthrie v. Foster, 256 Ky. 753, 764, 76 S.W.2d 927, 931-32 (1934). *See also* CRANE & BROMBERG, *supra* note 18, § 14(a), at 66 n.95.

¹⁴³451 N.E.2d at 65. The court did not opine as to how the Internal Revenue Service might react.

¹⁴⁴*Id.* at 65.

¹⁴⁵IND. CODE § 23-4-1-16 (1982). *See generally* CRANE & BROMBERG, *supra* note 18, § 36.

¹⁴⁶*See* CRANE & BROMBERG, *supra* note 18, § 36, at 197-98. There is authority to the contrary, *Brown & Begelow v. Roy*, 132 N.E.2d 755, 756-57 (Ohio Ct. App. 1955), but it is generally recognized by authorities that there must be reliance in both situations. This means that the third person must know of the representation in some way. *See* CRANE & BROMBERG, *supra* note 18, § 36, at 197-98. Section 16 of the Indiana Act is ambiguous on this point. However, it does refer to acting on the "faith of such representation." IND. CODE § 23-4-1-16 (1982). The subsequent reference to "whether the representation has or has not been made or communicated" to the person extending credit, *id.*, just means it is irrelevant how he learned of the representation. CRANE & BROMBERG, *supra* note 18, § 36, at 198.

¹⁴⁷451 N.E.2d at 65.

¹⁴⁸It would have been unfair to treat King as a partner for what appears to have

F. Share Repurchase Agreements

Decided during the survey period, *Anacomp, Inc. v. Wright*¹⁴⁹ is a warning to attorneys to exercise care in drafting share sale and buy back agreements. In *Anacomp*, the court of appeals affirmed in part, and vacated in part, a judgment of the Hendricks County Circuit Court.¹⁵⁰ Wright, a stockholder, brought the action for an accounting arising out of an executive employment and stock sale agreement.

The preliminary agreement in dispute provided for Wright's purchase of Anacomp shares as an equity incentive arrangement: some immediately, and the balance over a five-year period. It also provided that Wright would sell and Anacomp would repurchase the shares at the initial purchase price, if the agreement were terminated before the end of five years. Efforts to arrive at a definitive employment agreement were unsuccessful and the relationship ended on December 15, 1978.¹⁵¹

A purported addendum to this preliminary agreement was drafted by Anacomp shortly after the agreement was signed. The addendum stated that cash dividends would become Wright's property, but that shares paid as stock dividends would be "treated as a part of the originating shares, and . . . will be repurchased if the buy back arrangement is exercised along with the originating shares that are sold."¹⁵² At the end of the employment negotiations, Wright had more shares, as a result of stock dividends and stock splits, than he had purchased initially. The ultimate issue was whether or not Wright had to return those shares along with his initial purchase. The court said he did not.¹⁵³

One preliminary issue decided by the court was whether or not Wright was bound by the addendum. The court easily disposed of Anacomp's argument that by stipulating to the addendum's admission into evidence, Wright foreclosed any issue regarding the effect of the document.¹⁵⁴ Stipulations are agreements respecting business before a court, and are favored because litigation can be simplified and expedited if certain facts are admitted.¹⁵⁵ Although parties may be bound by stipulations, stipulations are not construed to admit facts which the

been a very generous gesture to aid Robertson at considerable personal expense. To impose additional losses on King after the losses he already had suffered would have been particularly unfortunate.

¹⁴⁹449 N.E.2d 610 (Ind. Ct. App. 1983), *reh'g denied*, July 6, 1983.

¹⁵⁰*Id.* at 610. The court vacated an award of prejudgment interest on agreement by the parties. *Id.* at 617-18. Anacomp argued that awarding "both interest and dividends was so internally inconsistent and irreconcilable that [it] should be granted a new trial." *Id.* at 615. The court concluded any inconsistency was remedied by vacating the prejudgment interest. *Id.*

¹⁵¹*Id.* at 612-13.

¹⁵²*Id.* at 614 n.2 (quoting the Record at 85).

¹⁵³*See id.* at 612.

¹⁵⁴*Id.* at 614-15. Wright testified that he had not seen the document until after he left Anacomp's employ. *Id.*

¹⁵⁵*Marshall County Redi-Mix, Inc. v. Matthew*, 447 N.E.2d 1165, 1167 (Ind. Ct. App.

parties obviously intended to controvert.¹⁵⁶ It was clear to the court that Wright had stipulated to the admissibility of the addendum to expedite the litigation, not as an assent to the assertion that it was part of the agreement. If Wright had agreed to the addendum, there would have been no reason to file suit.¹⁵⁷ It is likely that Wright was simply agreeing to admit the addendum into evidence for the trial court's consideration rather than admitting its purported effect. The court of appeals affirmed the lower court, agreeing that the addendum was not part of the original agreement.¹⁵⁸

Anacomp also asserted that the failure to reach a definitive employment agreement constituted a failure of consideration. Thus, Anacomp argued, rescission was the proper remedy whereby the original shares plus dividends should be returned to Anacomp, and Wright would receive the amount of his investment plus interest. The court of appeals rejected this argument, finding that the share transaction was actually a separate and distinct agreement, which was not affected by the parties' failure to reach a definitive employment agreement.¹⁵⁹

The court also rejected Anacomp's argument that Wright would have to return all of the shares in his possession in order to return the parties to the status quo, that is, reconvey the same percentage of equity he had originally purchased.¹⁶⁰ The court noted that the total share package proposed by Anacomp might have supported an inference of proportionate ownership, but the argument could not prevail because Wright did not purchase all of the stock offered. The court reasoned that because "the stock issued to Wright was restricted, there [was] nothing to stop Anacomp from recovering that proportionate interest when it [bought] back those shares."¹⁶¹

This reference to the restrictions placed on the stock originally issued to Wright is misleading. The restrictions on those shares were needed to satisfy the requirements of the federal securities laws. Such restrictions simply limit the ability of certain shareholders to sell their securities on the open market; they do not obligate the issuer to repurchase them.

1983); *Raper v. Union Fed. Sav. & Loan Ass'n*, 166 Ind. App. 482, 488, 336 N.E.2d 840, 844 (1975).

¹⁵⁶*Marshall County Redi-Mix, Inc. v. Matthew*, 447 N.E.2d 1165, 1167 (Ind. Ct. App. 1983); *Raper v. Union Fed. Sav. & Loan Ass'n*, 166 Ind. App. 482, 488, 336 N.E.2d 840, 844 (1975).

¹⁵⁷449 N.E.2d at 615.

¹⁵⁸*Id.*

¹⁵⁹*Id.* at 615-16. Arguably, if Wright had been seeking to rescind, Anacomp's argument might have been more persuasive. Instead, Wright was merely seeking a determination of his rights under the repurchase agreement.

¹⁶⁰*Id.* at 616.

¹⁶¹*Id.*

In fact, Wright would have been free to sell the shares on the open market once he satisfied the requirements of the federal securities laws. If the court meant that the restrictions required Wright to resell the shares to Anacomp, it is difficult to understand how it could hold that the additional shares were not part of the buy back agreement.

Arguably, the court misconstrued the restrictive nature of the additional shares received by Wright. However, the court did strike a rather interesting balance between the equities. The court noted that "Wright's ownership position was based on the investment of funds which he borrowed[.]"¹⁶² and therefore, Wright had to pay interest while Anacomp had use of the principal. The court found that while permitting Wright to keep the shares issued as dividends might be a windfall to him, Anacomp benefited by repurchasing the shares at a price substantially below the market price. Thus, *Anacomp* makes it clear that if a company issues shares as part of an employee incentive program and wishes to obligate the employee to reconvey, not only the initial block but also any shares received as stock dividends or stock splits, it should make it explicit in the agreement.¹⁶³

Without such an agreement, it is settled that dividends belong to the owner of the shares at the time the dividend is declared.¹⁶⁴ Anacomp argued that even if Wright were permitted to keep the stock dividends, he was not entitled to those shares received as a result of the stock splits. Although the court recognized a difference between the two,¹⁶⁵ it refused to treat the two differently. The court found that often the terms might be used interchangeably, the key being whether there was a transfer of accumulated earnings into capital or just a mere increase

¹⁶²*Id.*

¹⁶³These agreements are generally upheld if they are not tainted with fraud. *Id.* See *Shortridge v. Plates*, 458 N.E.2d 301 (Ind. Ct. App. 1984); *Steck v. Panel Mart, Inc.*, 434 N.E.2d 97 (Ind. Ct. App. 1983), discussed in Galanti, *Business Associations, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 31, 38-40 (1984). See also *Helms v. Duckworth*, 249 F.2d 482 (D.C. Cir. 1957); *In re Estate of Mather*, 410 Pa. 361, 189 A.2d 586 (1963). See generally 18 AM. JR. 2d *Corporations* § 314 (1965) (promises to repurchase by person other than corporation).

¹⁶⁴See *Bright v. Lord*, 51 Ind. 272, 276 (1875). See also HENN & ALEXANDER, *supra* note 52, § 332. Of course, this is an overstatement because there are different rules concerning allocation of dividends on shares in trusts. See generally *id.* § 333.

¹⁶⁵"Stock dividends suggest a capitalization of earnings or profits together with a distribution of the added shares which evince those assets transformed into capital," 449 N.E.2d at 617 (citation omitted), while "stock splits" denote "a mere increase in the number of shares evincing ownership without altering the amount of capital, surplus, or segregated earnings." *Id.* (citing 19 AM. JR. 2d *Corporations* § 808, at 284 (1965)). See generally HENN & ALEXANDER, *supra* note 52, §§ 329-30. Although a share dividend affects the capital of a corporation and a split does not, neither changes a shareholder's proportional interest in the corporation.

in the number of shares.¹⁶⁶ Because additional earned or capital surplus was transferred to the capital stock account of Anacomp whenever stock splits were declared, the court of appeals rejected Anacomp's argument and upheld the lower court's treatment of the share splits and share dividend as the same.¹⁶⁷

The result in *Anacomp* is correct. The propriety of Wright keeping the additional shares, although he had actually paid for less than half of his total holdings, is as irrelevant as Anacomp's possible windfall from repurchasing the shares at the purchase price, while having use of the funds upon which Wright was paying interest. Anacomp simply failed to provide in the agreement that Wright actually signed that Wright was obligated to reconvey not only the initial block of shares but any additional shares that might be issued as a dividend or as the result of a stock split.

G. Principal-Agent Relationship

Elements of the principal-agent relationship were at issue in *Hope Lutheran Church v. Chellew*.¹⁶⁸ In *Hope Lutheran*, the court of appeals reversed a judgment in favor of purchasers of life memberships in a retirement home project which failed; the judgment had been entered on a jury verdict.¹⁶⁹

A retired Lutheran minister proposed the retirement home project to the Federation of Lutheran Churches of Indianapolis.¹⁷⁰ Interested, the federation appointed an ad hoc committee to consider the proposal; the federation then funded an option on a parcel of land where the home could be built.

¹⁶⁶449 N.E.2d at 617. The court stated:

Courts have recognized, however, that what is demoninated [sic] by a corporation as a stock dividend may in truth be a stock split and vice versa. . . . Thus, while the corporation's denomination of an issue of stock to shareholders as a stock dividend or a stock split may be useful and definitive for certain purposes, courts, where necessary, will look behind that denomination to the essence of the corporate transaction to determine whether the dividend was in actuality issued as a result of a transfer of accumulated earnings into capital or as a mere increase in the number of shares of stock.

449 N.E.2d at 617 (citations omitted). See *In re Tealdis Trust*, 16 Misc. 2d 685, 182 N.Y.S.2d 68 (N.Y. Sup. Ct. 1958).

¹⁶⁷449 N.E.2d at 617. Outside of the trust context however, there is no reason why shares issued in a split would not belong to the record owner—at least in the absence of a separate agreement.

¹⁶⁸460 N.E.2d 1244 (Ind. Ct. App. 1984).

¹⁶⁹*Id.* at 1245. Plaintiffs did not appeal a directed verdict in favor of defendants that rejected their efforts to pierce the corporate veil and hold the directors personally liable. *Id.* at 1252 n.11.

¹⁷⁰460 N.E.2d at 1245. The Federation is made up of several Lutheran churches in the Indianapolis area. However, not all defendant churches were members of the Federation. *Id.* at 1245 n.3.

Soon thereafter, bylaws and articles of incorporation were drafted for an Indiana not-for-profit corporation that would operate the home. The articles stated that the corporation was to be “a joint agency” of the participating congregations and that control would be vested in a board of directors made up of laypersons and ministers divided equally among the four national Lutheran bodies.¹⁷¹ Copies of the corporate documents were sent to all Lutheran churches in central Indiana along with application forms stating that membership in the corporation would “in no way or manner financially obligate”¹⁷² the congregations.

Directors were elected by the member congregations to manage the corporation’s affairs when it was organized. Among other things, the board of directors “approved the contracts to be used in selling life memberships to prospective residents of the retirement home.”¹⁷³ Although a substantial number of memberships were sold, eventually the project failed as a result of zoning and financing problems. The plaintiffs, who had purchased memberships, then sued for the return of their downpayments.

The question confronting the court of appeals in *Hope Lutheran* was whether the participation of the churches “in the creation and operation of [the corporation gave] rise to an actual or apparent agency or agency by estoppel relationship.”¹⁷⁴ The court’s analysis of the actual agency theory started out correctly with the premise that agency is a relationship “resulting from the manifestation of consent by one party to another that the latter will act as an agent for the former. Additionally, the agent must acquiesce to the arrangement and *be subject to* the principal’s control.”¹⁷⁵ However, when the court summarized the required

¹⁷¹*Id.* at 1246.

¹⁷²*Id.* (quoting the Record at 2034).

¹⁷³460 N.E.2d at 1247. The actual sales were made by representatives of a sales agency retained by the corporation. *Id.*

¹⁷⁴*Id.* The court might have been more accurate if it had used the term “authority” rather than “agency” in stating the issue. For if the churches had been held liable, it would have been because the corporation had actual or apparent authority to act for them or because they were estopped. *See generally* W. SEAVEY, AGENCY § 8 (1964) (“An agent may have power to create relations between the principal and a third person because of authority, apparent authority, estoppel, or inherent agency power.”) [hereinafter cited as SEAVEY]. Imprecision is not uncommon in agency cases, and it probably would not have made any difference in the outcome of the case if the word “authority” had been used.

¹⁷⁵460 N.E.2d at 1247 (emphasis added) citing *Lafayette Bank & Trust Co. v. Price*, 440 N.E.2d 759, 761 (Ind. Ct. App. 1982); *Lewis v. Davis*, 410 N.E.2d 1363, 1366 (Ind. Ct. App. 1980); *Mooney-Mueller-Ward, Inc. v. Woods*, 175 Ind. App. 302, 307, 371 N.E.2d 400, 403 (1978)). *See generally* SEAVEY, *supra* note 174, § 2 (“Agency deals with the rules applicable to the legal relations which arise when two persons agree that one is to act for the benefit of the other in accordance with the other’s directions.”). This definition closely parallels the definition of agency in RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

elements of an actual agency relationship, it seemed to require that the principal have exerted control over the agent *in fact*.¹⁷⁶ This is an unduly narrow reading of the control element in the actual agency relationship. It is generally accepted that the right to control is essential, but a principal's failure or disinclination to actually exercise control does not negate the relationship.¹⁷⁷

Next, the *Hope Lutheran* court relied on *Mooney-Mueller-Ward, Inc. v. Woods*.¹⁷⁸ In *Mooney-Mueller-Ward*, the court found that where the putative principal exerted absolutely no control over the operation of the business, the evidence was insufficient to support a finding of an actual agency relationship.¹⁷⁹ Yet, it does not follow from the non-exercise of and apparent nonexistence of control in *Mooney-Mueller-Ward* that the churches in *Hope Lutheran* did not possess the right to control the retirement home.

The plaintiffs argued that the "joint agency" statement in the articles of incorporation was a manifestation of the churches' wish that the retirement home corporation act as their agent. They argued that the control element of the relationship was satisfied because the defendants had sent delegates to annual meetings, and had ministers or laypersons serving on the board of directors.¹⁸⁰

These arguments were rejected as the court concluded that any involvement of the churches in organizing the corporation ended when the corporation was formed and became a distinct and separate entity.¹⁸¹ The court characterized the "joint agency" statement as simply referring to the retirement home as an agency in itself,¹⁸² finding support from testimony of the attorney who had drafted the incorporation documents. Although the attorney's testimony was uncontradicted, it appeared to be inconsistent with the document itself. Yet the court of appeals ignored this fact. The articles did not say the *home* was to be a joint agency; rather, it said the *corporation* was to be a joint agency. It is established that a corporation can be an agent, and its acts will bind the principal even if the corporate fiction is maintained.¹⁸³

Hope Lutheran correctly recognized that the retirement home project was controlled by its board of directors.¹⁸⁴ From this proposition, the

¹⁷⁶460 N.E.2d at 1247-48.

¹⁷⁷See generally SEAVEY, *supra* note 174, §§ 3E, 84C, 145.

¹⁷⁸175 Ind. App. 302, 371 N.E.2d 400 (1978).

¹⁷⁹460 N.E.2d at 1248. Cf. *Courtney v. G.A. Linaker Co.*, 173 Ark. 777, 293 S.W. 723 (1927) (Although principal no longer exercised control over agent, court required notice of revocation before power to bind principal expired.).

¹⁸⁰460 N.E.2d at 1248.

¹⁸¹*Id.*

¹⁸²*Id.* at 1248-49.

¹⁸³See, *May v. Ken-Rad Corp.*, 279 Ky. 601, 131 S.W.2d 490 (1939).

¹⁸⁴460 N.E.2d at 1249.

court concluded that the corporation's actions were the result of the board of directors acting as a board. This is possible, yet it is not the only conclusion. It is just as possible that the "joint agency" reference was an objective manifestation that the corporation would be the agent of the member congregations, with control being exercised by the members and ministers serving on the board as their representatives.¹⁸⁵ At least there appeared to be enough evidence below to sustain this proposition. Furthermore, this last result would have been possible without doing violence to another general proposition: that members of a not-for-profit corporation are not liable for acts of the entity unless they participate in those acts. Thus, an actual agency relationship in *Hope Lutheran* could have been found.

An apparent agency relationship or more accurately, apparent authority, requires a manifestation by the principal to a third party that an agent has authority, along with the third party reasonably relying on the manifestation.¹⁸⁶ This general proposition was recognized in *Hope Lutheran*,¹⁸⁷ as was the proposition that the manifestations or statements made by the agent are not sufficient to create an apparent agency relationship.¹⁸⁸ The court agreed with the defendants' assertion that no representations were made to the plaintiffs that the home was the churches' agent or that they exercised control over the corporation.¹⁸⁹ The plaintiffs argued that the churches, by permitting the corporation to use the word Lutheran in the name of the home and in promotional literature, led

¹⁸⁵*Cf. Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947).

¹⁸⁶*See SEAVEY, supra* note 174, § 8D.

¹⁸⁷460 N.E.2d at 1248.

¹⁸⁸*Id.* (citing *Storm v. Marsischke*, 159 Ind. App. 136, 138, 304 N.E.2d 840, 842 (1973)).

It is interesting to note that another district of the court of appeals, in *Hartke v. Moore-Langen Printing & Publishing Co.*, 459 N.E.2d 430 (Ind. Ct. App. 1984), affirmed a judgment against former Senator Vance Hartke for campaign printing expenses because, in part, plaintiff acted reasonably in relying on the representation by Hartke's campaign manager (the agent) that he was "Hartke's agent." *Id.* at 432. *Hartke*, like *Hope Lutheran*, cited *Stuteville v. Downing*, 181 Ind. App. 197, 391 N.E.2d 629 (1979), as establishing the elements of an apparent agency relationship. 459 N.E.2d at 432. *See also Hope Lutheran*, 460 N.E.2d at 1248. However, the court in *Hartke* did not note the proposition made in *Storm v. Marsischke*, 159 Ind. App. 136, 304 N.E.2d 840 (1973), that representations made by a putative agent but rather will not create the apparent agency relationship, but rather representation must be from the principal to the third party. It is possible that the *Hartke* court just mentioned the campaign manager's statements in passing, as there was sufficient evidence that Hartke had held out his well-known campaign manager as his agent. *See SEAVEY, supra* note 174, § 21 (general rules for interpreting consensual agreements.). Of course, if this is true, the *Hartke* court can be faulted for careless use of language by making it at least "appear" that an agent's statements might establish the apparent agency relationship.

¹⁸⁹460 N.E.2d at 1249. Of course, there is no need to manifest "control" over the corporation if the churches manifested that the corporation was their agent. It would just follow.

them to believe that the home was supported by both Lutheran churches in general, and the participating congregations in particular.¹⁹⁰

For support, the plaintiffs looked to *Purcell v. Summers*,¹⁹¹ which enjoined a dissident group from using the name, "Methodist Episcopal Church, South," after a merger of three Methodist churches, because the name gave the impression that the group was the successor to one of the constituent churches. The *Hope Lutheran* court was not persuaded by this use of "trade name law."¹⁹² It concluded that the *Purcell* defendants were not using the terms in a generic sense, unlike the defendants in *Hope Lutheran*. Here, the word "Lutheran" was used in a generic sense as a broad reference to a particular Protestant denomination.¹⁹³ Arguably however, it was not unreasonable for the members of the Lutheran congregations to perceive that their church was affiliated with a corporation that had "Lutheran" in its name, especially when the corporation had the blessing of the congregations.¹⁹⁴

The court found that the individual congregations could have inserted their individual congregational names in the name of the home if they had wished to convey affiliation with the home.¹⁹⁵ Yet this is not a very practical suggestion, as nineteen separate congregations were involved. In fact, the number of congregations involved might have been the reason why the term "Lutheran" was used. That is, the term was used to convey the involvement of the defendant churches in the affairs of the retirement home without listing every congregation in the corporate name; or at least, it would seem that a jury might so conclude.¹⁹⁶

The plaintiffs' agency by estoppel argument also failed. The court stated that equitable estoppel requires a defendant to have made false representations or to have concealed material facts with knowledge of, or ability to learn, the true facts; the representations must have been made to the plaintiffs with the intent to induce reliance on those statements; and, the plaintiffs must have changed their position in reliance

¹⁹⁰*Id.*

¹⁹¹145 F.2d 979 (4th Cir. 1944).

¹⁹²460 N.E.2d at 1250.

¹⁹³*Id.* at 1250, n.8.

¹⁹⁴The court did not discuss the statement in the application sent out to individual churches, that membership would not financially obligate the congregation. This is understandable because such a restriction would not be effective against third parties, at least as far as apparent authority is concerned. See generally SEAVEY, *supra* note 174, §§ 8A, 75E (placing limitations on an agent's authority).

¹⁹⁵460 N.E.2d at 1250-51.

¹⁹⁶The court also stated that the term "Lutheran" in the home's name "did not exhibit the degree of control . . . necessary to create an apparent agency." *Id.* at 1251. The relevance of this assertion is questionable, as apparent authority depends on the *manifestation of authority to act*, not necessarily actual control over the putative agent. See SEAVEY, *supra* note 174, § 8D.

on the statements.¹⁹⁷ The plaintiffs argued that these elements were satisfied when the defendants permitted the use of “Lutheran” in the home’s name without disclosing that the individual congregations would not be financially responsible for the home’s operations. The court rejected this argument because the representations in question were made by the corporation rather than the churches.¹⁹⁸ Although this is facially true, it was a very narrow reading of the trial court record. The churches were involved in organizing the home, and were also members of the corporation. They could be deemed to have represented their involvement to their parishioners to at least that extent.¹⁹⁹

It is easy to sympathize with the defendant churches if they had been subjected to substantial financial liability for the failed venture. Such a liability would presumably had to have been satisfied from contributions by parishioners. The plaintiffs who lost their downpayments for the home are also deserving of sympathy, particularly because the opinion in *Hope Lutheran* does not preclude a finding that the plaintiffs could reasonably rely on their perceptions that the individual congregations were involved. If this is the case, then a jury presented with the evidence could also have so concluded.

H. Statutory Developments

There were several statutory developments during the survey period which are of interest to those practicing in the business law area. None, however, effected major changes.

1. *Corporation Name*.—One such development was an amendment to the corporate name provision of the Indiana General Corporation Act.²⁰⁰ The prior statutory provision²⁰¹ contained numerous restrictions on the use of a corporate name that was the same as, or confusingly similar to, the name of a corporation that had ceased to exist as a

¹⁹⁷460 N.E.2d at 1251 (quoting *Kokomo Veterans, Inc. v. Schick*, 439 N.E.2d 639, 643 (Ind. Ct. App. 1982)).

¹⁹⁸460 N.E.2d at 1252. The court stated that *Kokomo Veterans*, 439 N.E.2d 639 (Ind. Ct. App. 1982), did not adopt the RESTATEMENT (SECOND) OF AGENCY § 8B (1958) definition of “estoppel,” although the elements in § 8B are similar to those considered in *Kokomo Veterans* 460 N.E.2d at 1251 n.10. It is not clear why the court, in *Hope Lutheran*, was reluctant to adopt § 8B.

¹⁹⁹Judge Neal filed a concurring opinion emphasizing that corporations are organized to conduct business with limited liability. 460 N.E.2d at 1252 (J., Neal, concurring). This certainly is true, as is his further statement that interested persons participating in a corporation’s business are not subject to residual liability as long as the corporate entity is respected. *Id.* It is possible to disagree, however, with his conclusion to the extent that the churches’ involvement might well have gone beyond mere interest, participation, and support.

²⁰⁰IND. CODE § 23-1-2-4 (Supp. 1984). A similar change was made to the Indiana Not-For-Profit Corporation Act. IND. CODE § 23-7-1.1-5(b) (Supp. 1984).

²⁰¹IND. CODE § 23-1-2-4(b) (1982).

result of a merger, consolidation, or a special corporate transaction, without the consent of any successor corporations. Indiana Code section 23-1-2-4(b), as amended,²⁰² now permits a corporation to take a name that is not distinguishable from the name of another corporation that has ceased to exist, or a corporation that is changing its corporate name or withdrawing from transacting business in Indiana.²⁰³

The amendment of this section is commendable. Changing the requirement that a corporation not "[t]ake or assume a corporate name the same as, or confusingly similar to," the name of other corporations,²⁰⁴ to a requirement that the name be "distinguishable" from the name of other corporations or reserved corporate names, is a worthwhile statutory simplification. The one word "distinguishable" says as much as the prior phrase, yet is not subject to a charge of legalese.

The amount of time for which a proposed corporation name can be reserved was increased from 30 to 120 days.²⁰⁵ In many cases the 30 day period simply was not long enough to complete the organization of a domestic corporation or a foreign corporation intending to apply for a certificate of admission.²⁰⁶ The 30 day reservation was renewable, but extending the period probably will reduce substantially the need for renewing the right to a name.

Furthermore, the 120 day period parallels section 9 of the Model Business Corporation Act,²⁰⁷ although there are dissimilarities between the two. The Model Act specifically directs the Secretary of State to determine if the reserved name is available for corporate use, while section 23-1-2-4(c) of the Indiana Act does this by implication. Additionally, the Model Act permits the transfer of a right to a reserved name, while section (c) does not.²⁰⁸ A similar provision probably should have been included in section (c). As it now stands, that section might preclude or at least hinder someone from forming a corporation with

²⁰²IND. CODE § 23-1-2-4(b) (1982 & Supp. 1984).

²⁰³Use of corporate names not distinguishable from the name of domestic or qualified foreign corporations with written consent is still permitted. IND. CODE § 23-1-2-4(b)(2)(B) (Supp. 1984).

The Act also repealed IND. CODE § 23-1-2-4(c)(1982), which had given the shareholders of dissolved corporations or corporations whose terms had expired "preemptive" rights in the corporation's name under certain circumstances.

²⁰⁴IND. CODE § 23-1-2-4(b) (1982) (amended 1984).

²⁰⁵IND. CODE § 23-1-2-4(c) (Supp. 1984). Additionally, the filing fee for preempting a corporate name was raised to \$20.00. IND. CODE § 23-3-2-2(O) (Supp. 1984).

²⁰⁶Presumably, there would be less of a problem for a corporation changing its name, or an existing foreign corporation intending to qualify, but there still could be problems for publicly held corporations that might have to schedule a shareholders meeting. IND. CODE § 23-1-2-4(c)(2)-(4) (Supp. 1984).

²⁰⁷MODEL BUSINESS CORP. ACT § 9 (1971).

²⁰⁸Compare MODEL BUSINESS CORP. ACT § 9 (1971) with IND. CODE § 23-1-2-4(c) (Supp. 1984).

a name reserved by another person, or a corporation intending to change its name, even if there were no objection.

Section 23-1-2-4(b)(2) prohibits the taking of a corporate name not distinguishable from a reserved name, except that the section permits the taking of a name of “another corporation” with its written consent.²⁰⁹ This written “consent” provision is limited by its terms to existing corporations, and does not refer to a person intending to form a corporation, or an existing corporation intending to change its name. Although the Secretary of State’s office might permit the use of a reserved name with the consent of the person entitled to the exclusive right to the name, the authority to do so probably should have been included in section (b)(2)(B), or the Model Act should have been followed more closely.

Another simplification was brought about in the corporate name area. Also simplified were the procedures to be followed by a foreign corporation applying for admission to do business in Indiana under an assumed name, when the requirements of section (b) preclude admission under its true corporate name.²¹⁰

2. *Resident Agents*.—Sections 23-1-2-5(b), (c)²¹¹ and 23-1-11-6(b), (c)²¹² were added to the General Corporation Act.²¹³ These provisions, respectively, specify procedures to be followed when a resident agent of one or more domestic or one or more foreign corporations changes address. The Act now permits one filing to cover all corporations represented by the agent, provided that each corporation has been notified in writing of the change. Admittedly, this reduces paperwork, but it does not reduce fees. The Indiana General Corporation Fee Act was amended so that the fee is four dollars for each corporation represented.²¹⁴

3. *Shareholder Meetings*.—Boards of directors or director committees have been allowed to conduct meetings “by means of a conference telephone or similar communications equipment by which all persons participating in the meeting can communicate with each other” since 1982.²¹⁵ The section of the General Corporation Act relating to shareholder meetings has now been amended to permit corporations with no more than ten shareholders to hold shareholder meetings in a similar

²⁰⁹IND. CODE § 23-1-2-4(b)(2)(B) (Supp. 1984).

²¹⁰

²¹¹IND. CODE § 23-1-11-3(b)-(c) (Supp. 1981). The Model Act uses a different approach to solve this problem. See MODEL BUSINESS CORP. ACT § 108(c) (1971).

²¹²IND. CODE § 23-1-2-5(b), (c) (Supp. 1984).

²¹³IND. CODE § 23-1-11-6(b), (c) (Supp. 1984). Parallel provisions were added to the Indiana Not-For-Profit Corporation Act. IND. CODE §§ 23-7-1.1-6(b)(c), 23-7-1.1-53(b)(c)(Supp. 1984).

²¹⁴IND. CODE § 23-3-2-2(j) (Supp. 1984).

²¹⁵IND. CODE § 23-1-2-11(h) (1982).

fashion.²¹⁶ This change, recognizing the miracles of modern telecommunications and how much of the ordinary business of corporations is carried on by such means, is as worthwhile for shareholder meetings as the 1982 change was for directors. There is nothing magical about the number ten but limiting the provision was certainly not unreasonable. It is possible to have a substantial number of persons communicating by a telecommunication system, but there comes a point of diminishing returns where confusion and a lack of clear communication might become a problem.²¹⁷

The only question that can be raised about section 23-1-2-9(b) is that it does not track the comparable director meeting provision.²¹⁸ That provision authorizes the telephonic meeting "unless otherwise provided" in the articles of incorporation or bylaws. Section 9(b) specifies that such meetings are authorized if "expressly *permitted* by its articles of incorporation or bylaws."²¹⁹ The approach taken in the section dealing with directors' meetings is preferable. If there is some reason shareholders of closely held corporations would not wish to have such meetings, they could so provide. However, unless they have taken anticipatory steps to amend the articles or the bylaws, it is distinctly possible that a situation might arise where there is a need and a desire to have a telephonic shareholder meeting which would not be permitted.²²⁰ Attorneys representing small corporations should seriously consider taking steps to permit telephonic meetings before the need arises, or face the frustration of having a procedure available by law but not available to the particular corporation.

4. *Corporate Dissolutions.*—Minor changes were made to the corporate dissolution procedures. The board of directors of a dissolving corporation must now notify the unclaimed property section of the Attorney General's office, the Department of Revenue, and the Indiana Employment Security Division of its dissolution, to request any clearances required by law.²²¹ The dissolution of shell corporations was also sim-

²¹⁶IND. CODE § 23-1-2-9(b) (Supp. 1984). Participation by these means constitutes presence in person at the meeting. *Id.*

The Indiana Not-For-Profit Corporation Act was also amended to permit conference call meetings for corporations with no more than ten members. IND. CODE § 23-7-1.1-9(b) (Supp. 1984).

²¹⁷There is no comparable limit on the size of boards of directors or director committees that may have conference call meetings. IND. CODE § 23-1-2-11(h) (1982).

²¹⁸*Id.*

²¹⁹IND. CODE § 23-1-2-9(b) (Supp. 1984) (emphasis added).

²²⁰It must be remembered that the shareholder consent mechanism might not be available in such a case because the consents must be signed prior to the action. IND. CODE § 23-1-2-9(p) (Supp. 1984). Also, all shareholders must sign the consent; this requirement might preclude using the mechanism.

²²¹Act of Mar. 7, 1984, Pub. L. No. 130-1984, § 4, 1984 Ind. Acts 1125 (codified as amended at IND. CODE § 23-1-7-1(b)(3) (Supp. 1984)). The clearances and notices are

plified. Publication of notices of dissolution for corporations that have no assets or liabilities is no longer required; in conjunction, a statement that the corporation has no assets is now permitted in lieu of filing a copy of the published notice that the corporation is being dissolved.²²²

5. *Delinquent Annual Reports*.—The rather cumbersome statutory provisions for revoking the rights and privileges of domestic and foreign corporations delinquent in filing annual reports for two years was recast and simplified by amending section 23-3-4-1(c) of the Indiana Annual Report Act.²²³ The new provision increases the time in which corporations can rectify their delinquent status from 30 days to 90 days, and specifies the time frame for administrative revocation by the Secretary of State. The changes would not appear to have any effect on the holding of *Duncan v. Jones*.²²⁴

6. *The Indiana Uniform Trade Secrets Act*.²²⁵—The General Assembly also made some changes to the Indiana Uniform Trade Secrets Act.²²⁶ One change was moving the provision authorizing a court to order payment of a reasonable royalty for no longer than the period during which a misappropriated trade secret could have been barred from the injunctive relief section²²⁷ to the section authorizing damages for trade secret misappropriations.²²⁸ This change is noted because there is no counterpart in the Uniform Trade Secrets Act,²²⁹ upon which the Indiana Act is based.

It is not clear what this section adds to the Trade Secrets Act. If neither damages, which represent the actual losses suffered by the owner of a trade secret, nor the unjust benefit obtained by the misappropriator can be established, and injunctive relief is not appropriate, it is hard

not required when incorporators surrender a certificate of incorporation before commencing business. IND. CODE § 23-1-7-1(a) (Supp. 1984).

The procedure for surrendering the certificate of a not-for-profit corporation was also simplified. Act of Mar. 7, 1984, Pub. L. No. 130-1984 § 17, 1984 Ind. Acts 1125 (codified at IND. CODE § 23-7-1.1-33(a) (Supp. 1984)).

²²²IND. CODE § 23-1-7-1(b)(3), 1(b)(4)(F) (Supp. 1984).

²²³IND. CODE § 23-3-4-1(c) (Supp. 1984).

²²⁴450 N.E.2d 1019 (Ind. Ct. App. 1983), discussed at *supra* at notes 97-116.

²²⁵IND. CODE §§ 24-2-3-1 to -8 (1982) discussed in Galanti, *Business Associations, 1982 Survey of Recent Developments Indiana Law*, 16 IND. L. REV. 25, 50-56 (1983).

²²⁶IND. CODE §§ 24-2-3-1 to -8 (1982).

²²⁷Act of Feb. 29, 1984, Pub. L. No. 50-1984, § 3, 1984 Ind. Acts 625 (codified as amended at IND. CODE § 24-2-3-3(b) (Supp. 1984)).

²²⁸IND. CODE § 24-2-3-4(b) (Supp. 1984).

²²⁹UNIF. TRADE SECRETS ACT §§ 1-12, 14 U.L.A. 541 (1980). The Indiana Act continues to authorize an imposed royalty if a court determines that it would be unreasonable to prohibit future use of the misappropriated trade secret, but for no longer than the period of use could have been prohibited. IND. CODE § 24-2-3-3(b) (1982 & Supp. 1984). Unlike the comparable provision of the Uniform Act, UNIF. TRADE SECRETS, ACT § 2, 14 U.L.A. 542 (1980), this authority is limited to "exceptional circumstances," indicating a legislative intent that the enforced royalty provision is to be used sparingly.

to see what basis there is for imposing any monetary sanction on a misappropriator. In fact, it is questionable whether there has been a misappropriation of a trade secret other than in a metaphysical sense, under these circumstances. Perhaps it is an attempt to impose some monetary sanction where the exemplary damages provision permitting double damages for a willful and malicious misappropriation would not be available.²³⁰

²³⁰IND. CODE § 24-2-3-4(a) (1982).

III. Civil Procedure and Jurisdiction

WILLIAM F. HARVEY*

A. Jurisdiction, Process, and Venue

1. *Personal Jurisdiction*.—Several significant cases from the Indiana Court of Appeals and the United States Supreme Court involving personal jurisdiction¹ were decided during the survey period. In *Woodmar Coin Center, Inc. v. Owen*,² Woodmar, an Indiana corporation, advertised silver coins for sale in the *Wall Street Journal*. Owen, a Texas resident, telephoned Woodmar regarding the advertisement. The parties conducted

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¹Several opinions regarding subject matter jurisdiction deserve some attention. *Cha v. Warnick*, 455 N.E.2d 1165 (Ind. Ct. App. 1983), *transfer denied*, March 16, 1984, contains an important interpretation regarding the relationship between the Indiana Medical Malpractice Act, IND. CODE §§ 16-9.5-9-1 to -10 (1982), and the jurisdiction of the trial court. A medical malpractice action was filed before a claim was filed with the Indiana Department of Insurance pursuant to Indiana Code section 16-9.5-9-2. The court of appeals held that the trial court lacked subject matter jurisdiction to enter a default judgment against a physician named in the malpractice action. 455 N.E.2d at 1167.

The opinion of the medical review panel is a prerequisite to subject matter jurisdiction over a health care provider. Pending such an opinion, a court has limited authority to act. IND. CODE §§ 16-9.5-10-1 to -2 (1982). Interpreting the Act, the court found no authority to enter a default judgment. Rather, the proper remedy is dismissal without prejudice because the judicial action was filed before a claim was filed with the Indiana Department of Insurance. 455 N.E.2d at 1167. In short, trial courts have no authority to dismiss for any reason with prejudice until the statutory prerequisites of the Medical Malpractice Act have been met.

In another area, review of administrative action, subject matter jurisdiction analysis plays a critical role. Generally, the exhaustion of available administrative remedies is required before a court can exercise jurisdiction to grant relief. *See, e.g., Northside Sanitary Landfill, Inc. v. Indiana Env'tl. Mgmt. Bd.*, 458 N.E.2d 277 (Ind. Ct. App. 1984), *transfer denied*; *Carlson v. Miller*, 455 N.E.2d 951 (Ind. Ct. App. 1983). The exhaustion doctrine was found to be inapplicable in *Ahles v. Orr*, 456 N.E.2d 425 (Ind. Ct. App. 1983), in which the legality of an executive order by the Governor of Indiana was attacked. The court of appeals decided that by the express terms of the Indiana Administrative Adjudication Act, the Governor is not an agency subject to the statute. *See* IND. CODE § 4-22-1-2 (1982).

The court further reasoned that under the doctrine of separation of powers, the judiciary is the only branch of government with the power to declare the Governor's executive order invalid. Consequently, even if this action were within the administrative procedures, the plaintiff would be relieved of the exhaustion requirement because the remedy is inadequate or the action futile in that an administrative body cannot overrule the Governor. 456 N.E.2d at 426.

²447 N.E.2d 618 (Ind. Ct. App. 1983), *transfer denied*, August 25, 1983.

substantial negotiations during several telephone calls, with each party initiating some of the calls. During the course of these telephone conversations, the parties apparently agreed on the price, the method of inspection by Owen, and the manner of payment. After Woodmar shipped the coins to Owen's bank for inspection, the coins were returned allegedly because their condition had not been accurately represented to Owen.³

Woodmar filed suit in Indiana state court alleging breach of contract. Owen contended that the Indiana court lacked personal jurisdiction over him. The trial court agreed and granted Owen's motion for summary judgment on that basis. On appeal, the central issue for decision was whether Owen had "sufficient minimum contacts" with Indiana to constitute "doing business" under Indiana's long-arm statute.⁴

The court found that three pertinent facts established sufficient "minimum contacts" to permit the exercise of personal jurisdiction over the Texas resident consistent with due process. The key facts included: two telephone calls by Owen to Woodmar which initiated the relationship; the substantial negotiations conducted between the parties; and a contract to purchase the coins entered into by the parties. The court concluded that "Owen purposely availed himself of the benefits and responsibilities of doing business in this State by soliciting, negotiating and forming a contract with an Indiana resident."⁵

*Bryan Manufacturing Co. v. Harris*⁶ involved the sale of real property located in White County, Indiana. The seller, Bryan Manufacturing, an Ohio corporation with its principal office in Michigan, commenced an action for specific performance against the buyers, all residents of Illinois. The parties had negotiated a contract for the sale of the Indiana property through an Illinois real estate agent and had executed the contract in Illinois. The purchasers made two or three trips to Indiana to inspect the property and one of the purchasers appeared before the Monticello Common Council seeking approval of a bond issue relating to the property.⁷

The court found, in a case of first impression in Indiana, that pursuant to Trial Rule 4.4(A)(5),⁸ the purchasers, as equitable owners, had a sufficient interest in the land and related contacts with Indiana

³*Id.* at 619.

⁴*See* IND. R. TR. P. 4.4(A)(1).

⁵447 N.E.2d at 621. The court of appeals, however, found the trial court's error to be harmless in light of its ruling on the statute of frauds question. *Id.*

⁶459 N.E.2d 1199 (Ind. Ct. App. 1984).

⁷*Id.* at 1200.

⁸Trial Rule 4.4(A)(5) provides for long-arm jurisdiction arising from "owning, using, or possessing any real property or an interest in real property within this state." IND. R. TR. P. 4.4(A)(5).

to satisfy the requirements for personal jurisdiction.⁹ The court observed that, under Indiana law, upon execution of a contract for the sale of land, equitable title to the property rests in the buyer. As such, the buyers were entitled to all the rights of an owner¹⁰ but also assumed all obligations of ownership. As equitable owner, the buyer assumes the risk of loss and the responsibility for property taxes and receives any appreciation in value. The seller simply retains legal title as a security interest.

Against this background of Indiana law, the court correctly held that the equitable interests of the out-of-state purchasers, together with related contacts with Indiana,¹¹ were sufficient to create personal jurisdiction for the purpose of specific performance of the contract.¹² The court found that the residence of the seller was not significant because Indiana “has an important interest in providing redress for owners of real property in this state regardless of their residence status.”¹³

In a related holding, the court concluded that the buyers were not, however, doing business in Indiana pursuant to Trial Rule 4.4(A)(1). The negotiation and execution of a contract for the purchase of real property, alone, does not constitute “doing business.” Furthermore, the buyers’ conduct was not advancing any ongoing business.¹⁴

The United States Supreme Court in *Keeton v. Hustler Magazine, Inc.*¹⁵ sustained in personam jurisdiction over the defendant magazine based on the New Hampshire long-arm statute. Keeton commenced a libel action against Hustler Magazine in New Hampshire District Court based on diversity of citizenship. Hustler Magazine, an Ohio corporation with its principal place of business in California, sold approximately 10,000 to 15,000 copies of *Hustler* magazine in New Hampshire each month.¹⁶

Both the federal district court and court of appeals held that *the plaintiff* lacked sufficient contact with New Hampshire such that any

⁹459 N.E.2d at 1201.

¹⁰*Id.* at 1203 (citing *Carmichael v. Snyder*, 209 Va. 451, 455, 164 S.E.2d 703, 706 (1968)).

¹¹The related contacts included trips to inspect the property in Indiana and the appearance before the Monticello Common Council seeking approval of a bond issue relating to the property. 459 N.E.2d at 1203.

¹²*Id.*

¹³*Id.*

¹⁴*Id.* at 1204. *Cf. Griesse-Traylor Corp. v. Lemmons*, 424 N.E.2d 173 (Ind. Ct. App. 1981) (single purchase of the stock of an Indiana corporation constituted “doing business”); *Suyemasa v. Myers*, 420 N.E.2d 1334 (Ind. Ct. App. 1981) (visits to homes of Indiana residents to solicit stock purchases constituted “doing business” even though defendant did not have an office in the state).

¹⁵104 S. Ct. 1473 (1984).

¹⁶*Id.* at 1477.

application of New Hampshire's long-arm statute to acquire personal jurisdiction over Hustler would violate due process.¹⁷ The United States Supreme Court disagreed and stated that the proper focus is "the relationship among *the defendant*, the forum, and the litigation."¹⁸ The regular sale of thousands of its magazines in New Hampshire each month was unquestionably sufficient minimum contacts between the state and Hustler Magazine. Keeton sought to recover damages suffered in all states in the one suit in New Hampshire. Therefore, the defendant's contacts with the forum must be evaluated in light of that claim. "[T]he combination of New Hampshire's interest in redressing injuries that occur within the State and its interest in cooperating with other States in the application of the 'single publication rule' demonstrate the propriety of requiring [Hustler] to answer to a multistate libel action in New Hampshire."¹⁹

The Court squarely held that *the plaintiff's* lack of contacts with the forum state did not defeat jurisdiction which was otherwise proper under New Hampshire law and the due process clause: The "plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts."²⁰

In *Jones v. Calder*,²¹ the United States Supreme Court affirmed the assertion of jurisdiction in California over a writer and an editor because their intentional conduct in Florida was calculated to cause injury in California.²² Jones, an entertainer living and working in California, brought a libel suit in California state court against the writer and editor because of an article concerning her. The article appeared in the *National Enquirer*, a national weekly newspaper with a total circulation of more than 5,000,000, of which approximately 600,000 are sold in California.²³

The Court approved the "effects" test employed by the California court:²⁴ "The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."²⁵ The Court rejected, however, the notion that first amendment concerns enter into the jurisdictional analysis.²⁶

¹⁷Keeton v. Hustler Magazine, Inc., 682 F.2d 33, 33 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1473 (1984).

¹⁸104 S. Ct. at 1478 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)) (emphasis added).

¹⁹104 S. Ct. at 1480 (footnote omitted).

²⁰*Id.* at 1481.

²¹104 S. Ct. 1482 (1984).

²²*Id.* at 1488.

²³*Id.* at 1484-85.

²⁴*Id.* at 1487.

²⁵*Id.* at 1485-86 (footnote omitted).

²⁶*Id.* at 1487.

Finally, the United States Supreme Court, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,²⁷ refused to sustain jurisdiction in a Texas court over a claim for wrongful death which arose in Peru. Decedents were killed in a helicopter crash in Peru while being transported in Helicopteros Nacionales' (Helicol) aircraft.²⁸ The Court noted that "[a]ll parties . . . concede that respondents' claims against Helicol did not 'arise out of' and are not related to, Helicol's activities within Texas . . .'"²⁹ for purposes of exercising personal jurisdiction over Helicol pursuant to the Texas long-arm statute.³⁰ While recognizing that Helicol did some business in Texas, the Court held that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."³¹

It appears the Court is imposing a greater showing of minimum contacts for truly *foreign* defendants since, assuredly, Helicol's contacts with Texas met the traditional minimum contacts requirements.³²

2. Adequate Notice and Process.—Two cases during the survey period addressed the subject of adequate due process notice requirements in similar default judgment situations. The Indiana Court of Appeals, in *Vanjani v. Federal Land Bank of Louisville*,³³ considered whether notice of sale during the equitable redemption period was required in addition to the previous notice of the commencement of a foreclosure action. The Vanjanis defaulted on a loan secured by a real estate mortgage. A foreclosure action was commenced and the Vanjanis received process by certified mail in Arizona pursuant to Indiana Trial Rule 4.9(B)(2). Both return receipts were apparently signed by the wife who had a limited understanding of English and failed to inform her husband of the certified mail process. A default judgment was entered, the mortgage foreclosed, and the property sold.³⁴

The Vanjanis sought to set aside the default judgment and sale alleging that they were entitled to notice of the sale because they could have redeemed the property by paying the judgment at any time prior to sale, compatible with their equitable right of redemption. The Vanjanis argued that an equitable right of redemption is a property right which cannot be extinguished without due process of law and an opportunity to be heard. They contended that additional notice after initial service

²⁷104 S. Ct. 1868 (1984).

²⁸*Id.* at 1870.

²⁹*Id.* at 1872-73 (footnote omitted). *But see id.* at 1877-78 n.3 (Brennan, J., dissenting).

³⁰TEX. CIV. CODE ANN. § 2031(b) (Vernon 1964 & Supp. 1982-83).

³¹104 S. Ct. at 1874 (footnote omitted).

³²*See id.* at 1875 (Brennan, J., dissenting).

³³451 N.E.2d 667 (Ind. Ct. App. 1983), *transfer denied*, November 16, 1983.

³⁴*Id.* at 668-69.

of process regarding the foreclosure action was necessary to satisfy due process requirements.

The court disagreed: "Services of summons by certified mail was had upon [the] Vanjanis at their residence as required by Trial Rule 4.1(A)(1) and absent a showing of excusable neglect^[35] they are bound by the proceedings occurring thereafter."³⁶ By so holding, the court avoided the question regarding notice before the termination of an owner's equitable right of redemption.

In *Mennonite Board of Missions v. Adams*,³⁷ the United States Supreme Court addressed whether notice by publication and posting provides a mortgagee of real property identified in the public record with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes. The case arose in Indiana.³⁸ Under the relevant law notice by certified mail to the property owner was required, but at the time in question there was no provision for notice by mail or personal service to the mortgagee of the property.³⁹

The Court held that constructive notice to a mortgagee identified in the public record did not satisfy the due process requirement of the fourteenth amendment.⁴⁰ It recognized that neither notice by publication and posting, nor mailed notice to the property owner, is designed to inform the mortgagee.⁴¹ The Court stated, "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable."⁴² According to the Court, personal service or notice by mail is required regardless of the sophistication of the creditor or the creditor's ability to discover the nonpayment of property taxes.

The Court specifically refused to decide whether a mortgagee must receive notice of its right to redeem before the county auditor executes and delivers a deed to the tax-sale purchaser.⁴³ Like the similar question raised in *Vanjani*, it was unnecessary to the decision in *Mennonite*.

³⁵See IND. R. TR. P. 60(B).

³⁶451 N.E.2d at 670 (citing *Hines v. Behrens*, 421 N.E.2d 1155 (Ind. Ct. App. 1981); *Indiana Suburban Sewers, Inc. v. Hanson*, 166 Ind. App. 165, 334 N.E.2d 720 (1975)).

³⁷103 S. Ct. 2706 (1983). For a further discussion of this case, see Macey, *Constitutional Law, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 129, 138-41 (1985).

³⁸See *Mennonite Bd. of Missions, Inc. v. Adams*, 427 N.E.2d 686 (Ind. Ct. App. 1981), *rev'd*, 103 S. Ct. 2706 (1983).

³⁹103 S. Ct. at 2708. A provision was added to the Indiana Code in 1980 to provide such notice, subject to certain statutory requirements. See IND. CODE § 6-1.1-24-4.2 (1982).

⁴⁰103 S. Ct. at 2712. See also *Greene v. Lindsey*, 456 U.S. 444 (1982).

⁴¹*Id.* at 2711 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)).

⁴²103 S. Ct. at 2712.

⁴³*Id.* at 2712 n.6.

3. *Venue*.—*Grove v. Thomas*⁴⁴ is an instructive opinion on the concept of preferred venue contained in Trial Rule 75(A).⁴⁵ The plaintiffs were involved in two unrelated automobile accidents on the same day and in the same car, but at different times in different counties. They commenced suit in Cass County where their damaged automobile was usually kept, but where neither accident had occurred. The court of appeals considered whether Cass County was a county of preferred venue under Trial Rule 75(A)(2).⁴⁶

The court noted that a plaintiff may elect to bring suit in any county meeting the criteria established in Trial Rule 75(A)(1) through (9) and that there is no preference *among* such counties. If the plaintiff brings suit in a county of preferred venue, the defendant may not challenge the venue except to the extent that relief is available pursuant to Trial Rules 4.4(C) or 76.⁴⁷ The court held that a county in which chattels are regularly located or kept is a county of preferred venue when a complaint includes a claim for injuries to the chattel.⁴⁸

⁴⁴446 N.E.2d 641 (Ind. Ct. App. 1983), *transfer denied*, July 26, 1983.

⁴⁵In another case decided during the survey period, Trial Rule 75(A) was determined to be inapplicable. In *Frank H. Monroe Heating & Cooling, Inc. v. Rider*, 450 N.E.2d 1056 (Ind. Ct. App. 1983), an action in small claims court, the venue provisions of Small Claims Rule 12 were found inconsistent with the provisions of Trial Rule 75(A). In the case of such inconsistency, the Small Claims Rules govern, according to the court's interpretation of Trial Rule 1 and Small Claims Rule 1(A).

⁴⁶Trial Rule 75(A)(2) provides in part: "[Preferred venue lies in] the county where . . . the chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto" IND. R. TR. P. 75(A)(2).

⁴⁷446 N.E.2d at 642. Trial Rule 4.4(C) allows transfer to a more convenient forum while Trial Rule 76 provides for a change of venue in certain circumstances. IND. R. TR. P. 4.4(C), 76.

⁴⁸446 N.E.2d at 643. The other issue presented to the court of appeals involved Trial Rule 19. Plaintiffs contended that the joinder of the defendant parties was proper because complete relief could not be accorded if only one party were present because there would be great difficulty in apportioning the damages between the two defendants. Hence, plaintiffs argued, complete relief could not be accorded without joinder of both defendants. 446 N.E.2d at 643.

The court of appeals disagreed: "Difficulty in apportioning damages between the two defendants does not mean that complete relief cannot be granted." *Id.* Further, plaintiffs failed to show they would be unable to completely recover. Thus, the joinder of parties was not mandatory under Trial Rule 19. 446 N.E.2d at 643.

Joinder under Trial Rule 20(A)(2) was also held improper. 446 N.E.2d at 643. The test for determining whether or not two claims for relief arose from the same transaction or occurrence under Rule 20(A)(2) is one of "logical relationship." The court found no logical relationship between the two accidents that gave rise to the litigation. The accidents were unrelated and independent of each other because they occurred in different counties, seven hours apart. "Injury to the same person is not, standing alone, sufficient to satisfy the logical relationship test." 446 N.E.2d at 643.

In *State ex rel. Wade v. Cass Circuit Court*,⁴⁹ the Indiana Supreme Court acknowledged the right to a change of judge under Trial Rule 76⁵⁰ and Indiana Code section 34-2-12-1⁵¹ in certain postdissolution proceedings. In a 1981 case, the Indiana Court of Appeals found that the change of judge provision applied to a proceeding to modify visitation rights.⁵² The appellate court reasoned that the continuing jurisdiction of the trial court in custody and visitation cases did not prevent a change of judge.⁵³ In *Wade*, a proceeding to modify support, the Indiana Supreme Court agreed with the 1981 appellate court decision and rejected the claim that a change of venue from the county and a change of judge should be treated alike in postdissolution proceedings.⁵⁴

B. Pleadings and Pre-Trial Motions

1. *Trial Rule 15: Amended and Supplemental Pleadings.*—A negligence action arising from an auto accident was timely commenced in *Benke v. Barbour*.⁵⁵ The plaintiff requested both property and personal injury damages. After the statute of limitations period had run, the plaintiff sought to add his mother as a party-plaintiff. The plaintiff's mother was the owner of the vehicle driven by the plaintiff and thus the proper party to litigate the property damage claim.⁵⁶ The trial court allowed the addition, reasoning that the provisions of Trial Rule 15(C)⁵⁷

⁴⁹447 N.E.2d 1082 (Ind. 1983).

⁵⁰In civil actions denominated by the legislature, see IND. CODE § 34-2-12-1 (1982), a party is entitled a change of venue from the judge or county as a matter of right. IND. R. TR. P. 76(1). Two other cases decided during the survey period concerning a change of venue from the county addressed, respectively, the timeliness of a motion to change and the procedure of striking. See *State ex rel. Baber v. Circuit Court*, 454 N.E.2d 399 (Ind. 1983); *Abrahamson Chrysler Plymouth, Inc. v. Insurance Co. of N. Am.*, 453 N.E.2d 317 (Ind. Ct. App. 1983).

⁵¹Change of venue is permitted, upon proper application of either party, "[w]hen any matter of a civil, statutory or equitable nature not triable by a jury, is pending." IND. CODE § 34-2-12-1 (1982).

⁵²*K.B. v. S.B.*, 415 N.E.2d 749 (Ind. Ct. App. 1981).

⁵³*Id.* at 757.

⁵⁴447 N.E.2d at 1083 (citing *K.B. v. S.B.*, 415 N.E.2d 749 (Ind. Ct. App. 1981); *Rhinehalt v. Rhinehalt*, 73 Ind. App. 211, 127 N.E. 10 (1920)).

⁵⁵450 N.E.2d 556 (Ind. Ct. App. 1983).

⁵⁶*Id.* at 557.

⁵⁷Trial Rule 15(C) provides in part:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:

- (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
- (2) knew or should have known that but for a mistake concerning the

were satisfied because the new plaintiff's claim arose out of the same conduct and transaction as the original complaint, the defendant had received notice of the claim, and the failure to name the plaintiff's mother originally was a mistake.⁵⁸

The court of appeals surveyed Indiana and federal law to determine whether the amended complaint adding a new plaintiff related back to the date of the original pleading and was not therefore barred by the statute of limitations.⁵⁹ The court noted that Trial Rule 15(C) does not specifically address the addition of party-plaintiffs but that the Federal Rules of Civil Procedure Advisory Committee Notes indicate the federal rule applies to plaintiffs. The prior Indiana decisions in the area seemed to be inconsistent with each other but primarily denied any relation back when the addition of new parties constituted a new cause of action.⁶⁰ The reasoning was that if relation back were allowed in such cases the defendant would be denied the statute of limitations defense.

The court in *Benke* decided that relation back was proper for virtually the same reasons as the trial court had held.⁶¹ The court also noted that modern decisions have been more lenient when an honest mistake is made in naming or choosing the party-plaintiff. To bolster its argument, the court found additional support in the underpinnings of Trial Rule 17(A), which prohibits dismissal of an action until a real party in interest has been given a reasonable time to ratify or join the action.⁶² More

identity of the proper party, the action would have been brought against him.
IND. R. TR. P. 15(C)

⁵⁸450 N.E.2d at 557.

⁵⁹*Id.* at 558. It is, of course, well-settled in Indiana that an amendment to a pleading (as opposed to the addition of parties) relates back to the time of the filing of the original pleading. If the original pleading was timely, then an amendment to that pleading submitted after the statute of limitations has run is also considered timely. A party opposing a proposed amendment offered after the time to amend as of right must do more than merely utter a statement that the party will be prejudiced if the amendment is granted. *See, e.g., Allied Mills, Inc. v. P.I.G., Inc.*, 454 N.E.2d 1240 (Ind. Ct. App. 1983) (permitting amendment of pleadings after the statute of limitations had run to include a plea for recovery of punitive damages).

⁶⁰*See, e.g., Lamberson v. Crouse*, 436 N.E.2d 104 (Ind. Ct. App. 1982); *Parsley v. Waverly Concrete and Gravel Co.*, 427 N.E.2d 1 (Ind. Ct. App. 1981); *Bowling v. Holdeman*, 413 N.E.2d 1010 (Ind. Ct. App. 1980); *Gibson v. Miami Valley Milk Producers, Inc.*, 157 Ind. App. 218, 299 N.E.2d 631 (1973).

⁶¹450 N.E.2d at 559. *Cf. Wojcik v. Almase*, 451 N.E.2d 336 (Ind. Ct. App. 1983), *transfer denied*, November 23, 1983. In dicta, the *Wojcik* court commented that it did not appear that a plaintiff's amended complaint adding a defendant previously named as "Doe Corporation" would relate back so as to avoid the statute of limitations. The comment might be construed to mean that "Doe Corporation defendant" complaints are unacceptable and will not under any condition or circumstance relate back to the time of its original filing. Alternatively, the court simply might have meant that notice under Trial Rule 15(C), in the form of process summons, must be given within the time period of the relevant statute of limitations.

⁶²Trial Rule 17(A)(2) provides in part:

expansively, the court noted that essentially the issue is one of fairness, particularly when the defendant was a party and had actual notice before a new party-plaintiff was joined.

2. *Trial Rule 13(A): Compulsory Counterclaims.*—The opinion in *Daube and Cord v. LaPorte County Farm Bureau Co-operative Ass'n*⁶³ contains an excellent discussion of how compulsory counterclaims⁶⁴ operate when an “open account” is at issue. Daube and Cord, a partnership, maintained an open account for the purchase of feed and other goods from the Co-operative. A dispute arose concerning the quality of certain feed. Daube filed suit against the Co-operative in April, 1980; in the meantime, the parties continued to transact business. The April, 1980 suit was unresolved when Daube became delinquent on the open account and the Co-operative brought the instant suit against Daube on the outstanding balance.⁶⁵ Daube claimed the action for the outstanding balance was barred as a compulsory counterclaim to its earlier suit and moved to dismiss.⁶⁶

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time after objection has been allowed for the real party in interest to ratify the action, or to be joined or substituted in the action. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced initially in the name of the real party in interest.

IND. R. TR. P. 17(A)(2).

⁶³454 N.E.2d 891 (Ind. Ct. App. 1983).

⁶⁴Trial Rule 13(A) provides:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) at the time the action was commenced the claim was the subject of another pending action; or

(2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

IND. R. TR. P. 13(A).

Another decision during the survey period, *Rees v. Panhandle Eastern Pipe Line Co.*, 452 N.E.2d 405 (Ind. Ct. App. 1983), *transfer denied*, contains an excellent discussion of the elements of a compulsory counterclaim under Trial Rule 13(A).

⁶⁵454 N.E.2d at 892.

⁶⁶Daube also asserted the affirmative defense of accord and satisfaction. The court disagreed. *Id.* at 894. For other notable decisions during the survey period involving Trial Rule 8(C) affirmative defenses, see *Apple v. Kile*, 457 N.E.2d 254 (Ind. Ct. App. 1983), *transfer denied*, March 16, 1984 (impliedly holding that adverse possession is an affirmative defense under Trial Rule 8(C)); *Coleman v. Target Stores*, 456 N.E.2d 723 (Ind. Ct. App. 1983) (holding Trial Rule 8(C) applicable in an administrative agency proceeding).

The court of appeals found that the action on the outstanding balance of the open account was not a compulsory counterclaim. The court said that the plaintiff's record did not support his contention that the Co-operative's 1981 suit on the open account arose out of the same transaction or occurrence as his 1980 suit for defective feed. The record disclosed that allegedly defective feed was delivered in August, 1979 and was paid for by December, 1979, before Daube brought suit in April, 1980. The Co-operative's action was initiated in April, 1981. The court found that while both suits were based on the same open account, their logical relationship ended at that point. The defendant's April, 1981 claim was based on transactions which transpired long after the initiation of plaintiff's suit.⁶⁷

Additionally, the court observed that under Trial Rule 13(A) "[a] pleading shall state as a counterclaim any claim *which at the time of serving the pleading* the pleader has against any opposing party[.] . . ."⁶⁸ By its own language then, the Rule does not require parties to plead counterclaims which have not matured at the time they plead even if the claim arises from the same transaction or occurrence. Thus, the Co-operative's action against Daube, based on claims that arose after the filing of the first action, clearly was not a compulsory counterclaim.

The court also held, citing Indiana and federal cases, that the operative effect of Trial Rule 13(A) does not bar a compulsory counterclaim *until the first suit has proceeded to judgment*.⁶⁹ Thus, when the first suit has not proceeded to judgment before the defendant's claim is filed, then even if such claim was a compulsory counterclaim it would not be barred.

3. Trial Rules 9 and 9.2: Pleading Special Matters and Pleading and Proof of Written Instruments.—In the case of *Wilson v. Palmer*,⁷⁰ Wilson brought suit for damages against several defendants after discovering that a house which he recently purchased was subject to a demolition order. One defendant, the title insurer, moved to dismiss under Trial Rule 12(B)(6) for failure to state a claim upon which relief could be granted.⁷¹

The court of appeals sustained the dismissal because Wilson's complaint contained only a conclusory statement that the title insurer concealed the demolition order from Wilson and therefore the complaint failed to meet the requirements of Trial Rule 9(B).⁷² Strong Indiana

⁶⁷454 N.E.2d at 893.

⁶⁸*Id.* (quoting IND. R. TR. P. 13(A) (emphasis added by court)).

⁶⁹454 N.E.2d at 893.

⁷⁰452 N.E.2d 426 (Ind. Ct. App. 1983).

⁷¹*Id.* at 427.

⁷²Trial Rule 9(B) provides in part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred." IND. R. TR. P. 9(B).

precedent provides that the circumstances which constitute fraud must be specifically alleged consistent with Trial Rule 9(B).⁷³ Therefore, the court reiterated that "a complaint that fails the requirements of T.R. 9(B) does not state a claim upon which relief can be granted."⁷⁴

In a more noteworthy portion of the opinion, the court recognized that Wilson's claim for breach of contract, founded on a written contract between Wilson and the defendants, required the written contract to be appended to the complaint pursuant to Trial Rule 9.2(A). While it was undisputed that Wilson did not so append the contract, the court held that Wilson's failure to comply with the requirements of Trial Rule 9.2(A) did not warrant dismissal.⁷⁵ The court noted that before the 1970 amendments to the Indiana Trial Rules, when suit was brought on a written instrument and the instrument was not included or attached to the complaint, the complaint was subject to demurrer for failure to state a cause of action. That procedure is no longer the law, according to the court, particularly because Trial Rule 9.2(F) permits the trial court to amend a pleading in its discretion,⁷⁶ as does Trial Rule 15(A).⁷⁷

⁷³See, e.g., *Cunningham v. Associates Capital Servs. Corp.*, 421 N.E.2d 681 (Ind. Ct. App. 1981) (listing the circumstances constituting fraud such as the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was procured by the fraud).

Another recent decision, *Employers Ins. of Wausau v. Commissioner of Dep't of Ins.*, 452 N.E.2d 441 (Ind. Ct. App. 1983), affirmed the *Cunningham* interpretation of Trial Rule 9(B). Additionally, however, the court held that Trial Rule 9(B) is tempered with the language found in *Holliday v. Perry*, 38 Ind. App. 588, 78 N.E. 877 (1906), where the court held that if the facts alleged *show fraud*, either actual or constructive, then no positive averment of fraud is required. In short, the actual word "fraud" need not be alleged or used, provided that the averments in the complaint are sufficient to establish the fraudulent conduct as a basis for the action. 452 N.E.2d at 446-47.

⁷⁴452 N.E.2d at 428 (citing *Cunningham v. Associates Capital Servs. Corp.*, 421 N.E.2d 681 (Ind. Ct. App. 1981)).

⁷⁵452 N.E.2d at 429.

⁷⁶*Id.* at 429-30. Trial Rule 9.2(F) provides:

Non-compliance with the provisions of this rule requiring a written instrument to be included with the pleading may be raised by the first responsive pleading or prior motion of a party. The court, in its sound discretion, may order compliance, the reasons for non-compliance to be added to the pleadings, or allow the action to continue without further pleading. Amendments to correct the omission of a required written instrument, an assignment or indorsement thereof, or the omission of a denial of the execution of a written instrument as permitted or required by this rule shall be governed by Rule 15, except as provided by subdivision (A) of this rule.

IND. R. TR. P. 9.2(F).

⁷⁷Trial Rule 15(A) provides in part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty [30] days after it

The court held that under Trial Rule 9.2(A) and (F) a trial court should specifically order the plaintiff to comply with the Rule by amending the complaint to include the omitted instrument.⁷⁸ Although the Rule does not directly address the issue, if the plaintiff fails to amend the complaint as ordered within a reasonable time, the complaint should be dismissed after a hearing pursuant to Trial Rule 41(E).⁷⁹ If such a dismissal occurs, it will be for the failure to comply with the rules of court or court orders thereunder and not for the failure to state a claim upon which relief can be granted. The distinction is critical in appellate review.

4. *Trial Rule 56: Summary Judgment.—a. Standards.*—The opinion in *Tippecanoe Sanitary Landfill v. Board of County Commissioners*⁸⁰ contains a very clear discussion regarding the grant of a motion for summary judgment and the review of such a grant on appeal. The standard for granting a summary judgment motion under Trial Rule 56(C) includes a two-step inquiry:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that there is no genuine issue as to any material fact *and* that the moving party is entitled to a judgment as a matter of law.⁸¹

The trial court must accept as true all the facts alleged by the nonmoving party and resolve all doubts against the movant. Once the motion for summary judgment is made, the nonmoving party must affirmatively allege sufficient facts to establish the existence of factual issues, not merely rely upon allegations in its complaint. Even if the nonmoving party fails to make such a showing, summary judgment is improper

is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires.

IND. R. TR. P. 15(A).

⁷⁸452 N.E.2d at 430.

⁷⁹Trial Rule 41(E) provides:

Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

IND. R. TR. P. 41(E).

⁸⁰455 N.E.2d 971 (Ind. Ct. App. 1983), *transfer denied*, February 17, 1984.

⁸¹IND. R. TR. P. 56(C) (emphasis added). See *Nahmias v. Trustees of Ind. Univ.*, 444 N.E.2d 1204 (Ind. Ct. App. 1983), *transfer denied*, June 27, 1983 (considering the second step of the inquiry).

unless the movant demonstrates it is entitled to judgment as a matter of law.⁸²

Therefore, the review standard on appeal is accordingly established. The appellate court is also engaged in a two-step analysis. First, the appellate court must be satisfied that there was no genuine issue of material fact in dispute and, second, that the moving party is entitled to judgment as a matter of law.

b. Supporting materials.—In *McCullough v. Allen*,⁸³ an action by a medical doctor (McCullough) against an attorney (Allen) for abuse of process and malicious prosecution, a summary judgment motion was granted in favor of the attorney. The summary judgment motion was supported by the affidavit of an Indiana attorney stating that Allen acted reasonably in bringing the original action and that the claim of Allen's client was worthy of litigation. McCullough appealed the trial court's grant of summary judgment, contending that the affidavit merely stated the attorney's legal conclusion and, therefore, was improper under Trial Rule 56(E) which requires that affidavits must "set forth such facts as would be admissible in evidence."⁸⁴

The court of appeals found, however, that the trial court properly admitted the affidavit, stating that "a qualified attorney's legal opinion as to an ultimate fact in issue is admissible, unless it addresses matters within the common knowledge and experience of ordinary persons."⁸⁵ The court found that the affidavit in this case clearly did not state matters of common knowledge. In a malicious prosecution action, the court acknowledged, only an expert familiar with the law and with the standards employed by reasonable attorneys could testify whether a reasonable attorney would consider a claim worthy of litigation. Because the affiant was qualified to give such an opinion, this case was not affected by the general rule that a court may not enter summary judgment upon an affidavit stating conclusions of law or opinions by one not qualified to give such testimony. Therefore, the affidavit was properly relied upon.⁸⁶

C. Parties and Discovery

1. Trial Rule 19: Joinder of Claims and Remedies.—In *State v.*

⁸²455 N.E.2d at 974 (citing *Osborne v. State*, 439 N.E.2d 677, 684 (Ind. Ct. App. 1982); *Nationwide Mut. Ins. Co. v. Neville*, 434 N.E.2d 585, 589 (Ind. Ct. App. 1982); *Associates Fin. Servs. Co. v. Knapp*, 422 N.E.2d 1261, 1264 (Ind. Ct. App. 1981); *Moll v. South Cent. Solar Sys., Inc.*, 419 N.E.2d 154, 159 (Ind. Ct. App. 1981); *Kendrick Memorial Hosp. v. Totten*, 408 N.E.2d 130, 134 (Ind. Ct. App. 1980)).

⁸³449 N.E.2d 1168 (Ind. Ct. App. 1983).

⁸⁴IND. R. TR. P. 56(E).

⁸⁵449 N.E.2d at 1170 (citing *State v. Bouras*, 423 N.E.2d 741, 745 (Ind. Ct. App. 1981); *Rosenbalm v. Winski*, 165 Ind. App. 378, 385-86, 322 N.E.2d 249, 254 (1975)).

⁸⁶449 N.E.2d at 1170.

Merino,⁸⁷ the plaintiff brought an action against certain state employees in their individual capacities. The plaintiff sought damages for personal injuries sustained when his car left the road and struck a guard rail.⁸⁸

The defendants' motion to join the State as a party-defendant, pursuant to Trial Rule 19,⁸⁹ was granted. Later the State's motion for summary judgment, based upon lack of notice as required by the Indiana Tort Claims Act,⁹⁰ was granted. Eventually, the plaintiff's motion to correct errors, requesting that the judgment be vacated and the State dismissed as a party defendant, was granted.

The issue on appeal was whether or not, under Trial Rule 19(A)(2)(a),⁹¹ the State should have been joined as a party defendant. In making its determination, the court interpreted Indiana Code section 34-4-16.5-5(b) which provides that a governmental entity shall pay a judgment rendered against an employee "when the governor, in the case of a claim or suit against a state employee, . . . determines that paying the judgment . . . is in the best interest of the governmental entity."⁹² The court found that rather than mandating payment of a judgment by the State, the provision conditions payment upon the Governor's determination that paying the judgment is in the best interest of the State. The court concluded that the State's interest is, therefore, conditional at best.

The court also noted that the State failed to demonstrate that disposition of the action in its absence might impair its ability to protect its interest. Nowhere was it shown that the individual party defendants were incapable of raising any issue or defense which the State might raise.⁹³ The court concluded that absent those showings, it could not say that any of the State's interests in the litigation mandated joinder pursuant to Trial Rule 19(A)(2)(a).

In *Indiana Civil Rights Commission v. City of Muncie*,⁹⁴ the Civil Rights Commission argued that the trial court did not have jurisdiction

⁸⁷456 N.E.2d 437 (Ind. Ct. App. 1983).

⁸⁸*Id.* at 438.

⁸⁹IND. R. TR. P. 19.

⁹⁰IND. CODE § 34-4-16.5-1 to -19 (1982).

⁹¹456 N.E.2d at 438. Trial Rule 19(A)(2) provides:

A person who is subject to service of process shall be joined as a party in the action if

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

(a) as a practical matter impair or impede his ability to protect that interest, or

(b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

IND. R. TR. P. 19(A)(2).

⁹²IND. CODE § 34-4-16.5-5(b) (1982).

⁹³456 N.E.2d at 439.

⁹⁴459 N.E.2d 411 (Ind. Ct. App. 1984), *transfer denied*, May 18, 1984.

to consider an appeal from the Commission's findings. This assertion was based on the fact that the original complainant was not joined as a party to the review proceedings.

The court of appeals upheld the superior court's jurisdiction based on an interpretation of Trial Rule 19(A)(2)(a).⁹⁵ The appeals court said that even if the original complainant was an indispensable party, it did not follow that an action must be dismissed simply because the indispensable party was not named.⁹⁶ Instead, the court said, the Civil Rights Commission should have joined the original complainant pursuant to Trial Rules 14(A)(2)⁹⁷ and 20(A)(2),⁹⁸ or the original claimant should have sought to intervene under Trial Rule 24.⁹⁹ Another correct procedure is a discretionary order by the trial court that the person be made a party to the action or that the action should continue without the person.¹⁰⁰ Since neither the Commission nor the complainant took positive action

⁹⁵See *supra* note 91.

⁹⁶459 N.E.2d at 416. Trial Rule 19(B) provides the standard for determining when joinder is not feasible:

Notwithstanding subdivision (A) of this rule when a person described in subsection (1) or (2) thereof is not made a party, the court may treat the absent party as not indispensable and allow the action to proceed without him; or the court may treat such absent party as indispensable and dismiss the action if he is not subject to process. In determining whether or not a party is indispensable the court in its discretion and in equity and good conscience shall consider the following factors:

(1) the extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties;

(2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

(3) whether a judgment rendered in the person's absence will be adequate;

(4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

IND. R. TR. P. 19(B).

⁹⁷Trial Rule 14(A) provides in pertinent part: "A defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or maybe liable to him for all or part of the plaintiff's claim against him." IND. R. TR. P. 14(A).

⁹⁸Trial Rule 20(A)(2) provides:

All persons may be joined in one [1] action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of, or arising out of, the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

IND. R. TR. P. 20(A)(2).

⁹⁹459 N.E.2d at 416. Trial Rule 24 provides for permissive intervention and intervention as of right. See IND. R. TR. P. 24. See also *Developmental Disabilities Residential Facilities Council v. Metropolitan Dev. Comm'n*, 455 N.E.2d 960 (Ind. Ct. App. 1983) (containing a comprehensive discussion of Trial Rule 24 intervention).

¹⁰⁰459 N.E.2d at 416 (quoting *Lutheran Hospital v. Department of Pub. Welfare*, 397 N.E.2d 638, 647 (Ind. Ct. App. 1979)).

to secure the joinder of the complainant as a party to the action, the trial court did not err in denying the Commission's motion to dismiss.¹⁰¹

2. *Trial Rule 23: Class Actions.*—In *Shallenberger v. Hope Lutheran Church*,¹⁰² the court of appeals considered a question of first impression in Indiana. The issue was whether or not a trial court can restrict the plaintiff's contact with members of the proposed class to communications in the form of a court-approved preliminary notice to all members of the proposed class.

The trial court order required a consultation of all parties in the case and the preliminary approval of a specific notice prior to contacting proposed members of the plaintiff's class.¹⁰³ In effect, the order required plaintiff to seek the approval of the defendants before communicating with members of the proposed class.

The court cited and extensively discussed the case of *Gulf Oil Co. v. Bernard*,¹⁰⁴ in which the United States Supreme Court disapproved a restrictive "gag order" as an abuse of the trial court's discretionary power. The Indiana Appellate Court likewise disapproved the trial court's restrictions on communications with prospective class members, but did not reach any constitutional question. It held that the trial court abused its discretion because the record was devoid of any facts or authority to support the order.¹⁰⁵ The court, borrowing from *Bernard*, inferred that a trial court might impose such an order if it were sufficiently supported by factual findings and legal arguments demonstrating the need for such a restriction.¹⁰⁶

3. *Discovery Rules.*—*a. Workproduct privilege.*—The United States Supreme Court, in the case of *F.T.C. v. Grolier, Inc.*,¹⁰⁷ provided an important interpretation of the work product privilege under Federal Rule of Civil Procedure 26(b)(3). Its interpretation is directly applicable to Indiana Trial Rule 26(B)(3)¹⁰⁸ which contains the same language as the federal rule. *Grolier* involved an interpretation of exemption 5 of the Freedom of Information Act (FOIA) which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."¹⁰⁹ It

¹⁰¹459 N.E.2d at 416.

¹⁰²449 N.E.2d 1152 (Ind. Ct. App. 1983). In another recent case involving class actions, the Indiana Court of Appeals held that a complaint could not be entertained for failure to exhaust administrative remedies even though two counts of the complaint were designated as class actions pursuant to 42 U.S.C. § 1983. *May v. Blinzinger*, 460 N.E.2d 546 (Ind. Ct. App. 1984), *transfer denied*, June 14, 1984.

¹⁰³449 N.E.2d at 1154.

¹⁰⁴452 U.S. 89 (1981).

¹⁰⁵449 N.E.2d at 1156.

¹⁰⁶*Id.* at 1155.

¹⁰⁷103 S. Ct. 2209 (1983).

¹⁰⁸IND. R. TR. P. 26(B)(3).

¹⁰⁹5 U.S.C. § 552(b)(5) (1982).

is well established that the exemption was intended to include the attorney work product rule. The specific issue was whether an attorney's work product must be disclosed on a demand made under the FOIA after the litigation which produced the attorney's work product had ended.

The federal court of appeals had held that four documents developed during prior litigation could not be withheld on the basis of the work product privilege unless the party opposing disclosure (the FTC) could show that "litigation related to the terminated action exists or potentially exists."¹¹⁰ This interpretation of Federal Rule 26(b)(3) was reversed. The Supreme Court said that the history of the Rule was essentially silent on the question, "[b]ut the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation."¹¹¹ Specifically, the Court held that "under Exemption 5 [of the FOIA], attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared."¹¹²

b. Trial Rule 26: Termination of discovery.—The case of *Coster v. Coster*,¹¹³ contains an excellent discussion related to a trial court's power to terminate discovery at the request of a party. In a marital dissolution action the wife requested information from her husband, which was supplied by the husband during a four year period. The husband answered sets of interrogatories, provided financial statements, met with his wife's attorney, and testified at pre-trial discovery hearings and at trial concerning anticipated or prospective income or value in the husband's business. The husband moved for and obtained an order by the trial court which terminated all discovery.¹¹⁴

That order was sustained on appeal and the court's comments interpreting Trial Rule 26 are significant. The appellate court observed that discovery must be accorded a broad and liberal scope to provide all parties with information essential to the proper litigation of all relevant issues, to eliminate surprise, and to promote settlement. Discovery, however, like all matters of procedure, has ultimate and necessary boundaries. In ruling on issues of discovery, the trial court has a broad discretion which will not be upset on appeal absent a showing of apparent abuse of discretion and prejudicial error.¹¹⁵

¹¹⁰*Grolier Inc. v. F.T.C.*, 671 F.2d 553, 556 (D.C. Cir. 1982), *rev'd*, 103 S. Ct. 2209 (1983).

¹¹¹103 S. Ct. at 2213 (citing 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2024, at 201 (1970)).

¹¹²103 S. Ct. at 2215. The concurring opinion believed it was unnecessary for the majority to base its decision on an FOIA interpretation, in view of the holding regarding Federal Rule of Civil Procedure 26(b)(3). *Id.* at 2217 (Brennan, J., concurring).

¹¹³452 N.E.2d 397 (Ind. Ct. App. 1983).

¹¹⁴*Id.* at 399-400.

¹¹⁵*Id.* at 400.

The court stated that it is within the discretion of the trial court to place bounds on the extent of discovery; thus, the trial court may require that discovery be completed by a certain date to prevent delay of trial, or a trial court may refuse to continue a trial date in order that further discovery be conducted. The court of appeals observed that the trial court has inherent power to prescribe the terms and conditions of discovery, or to change or modify its orders as subsequent events may warrant. The trial court may also deny a request for further discovery on an issue when it determines that sufficient information has been exchanged to prepare a party's case on that issue, or when a trial court determines that the information sought already has been provided through prior discovery proceedings.¹¹⁶ The court recognized that the broad discretion allowed a trial court in ruling on discovery matters, coupled with the harmless error doctrine under Trial Rule 61,¹¹⁷ will bar reversal of a case because of discovery error or claimed mistake except "in the unusual case."¹¹⁸ The court found no abuse of discretion since very substantial information had been provided to the wife by the husband prior to the termination of all discovery.¹¹⁹

c. Trial Rule 30(D): Termination of deposition cross-examination.—*Briggs v. Clinton County Bank & Trust Co.*¹²⁰ involved extensive litigation among the parties concerning an estate. One of the questions on appeal was based on the trial court's order requiring the noninitiating party to pay for any further cross-examination during the taking of a deposition. The order effectively terminated the deposition, thereby implicating Trial Rule 30(D).¹²¹ The noninitiating party claimed he had a right to fully

¹¹⁶*Id.*

¹¹⁷Trial Rule 61 provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

IND. R. TR. P. 61.

¹¹⁸452 N.E.2d at 400.

¹¹⁹*Id.* at 401.

¹²⁰452 N.E.2d 989 (Ind. Ct. App. 1983), *transfer denied*, December 14, 1983.

¹²¹Trial Rule 30(D) provides:

At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(C).

cross-examine the witness at the expense of the initiating party.¹²²

The court of appeals noted that no Indiana precedent was available regarding the propriety of assessing costs against a party who has not initiated the deposition. Additionally, the trial rules are silent with respect to the party who may be required to bear the cost of a deposition.¹²³

Generally, the party instigating a deposition pays for the costs necessarily incurred as a result of the deposition, such as transportation costs, stenographic reporter's fees, transcription costs, and filing fees. However, under appropriate circumstances the trial court has discretion to require the noninitiating party to pay for discovery costs when, as here, it determines that the discovery process has been abused.¹²⁴ The record indicated that the deponent had given six hours of direct examination testimony and sixteen hours of cross-examination testimony before the trial court imposed the conditions on continuation of the cross-examination.¹²⁵

The appellate court upheld the trial court's order, finding no abuse of discretion.¹²⁶ The court noted that its holding was clearly consistent with other discovery rules relating to sanctions and the award of expenses and attorney's fees when the discovery process is abused.¹²⁷

If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

IND. R. TR. P. 30(D).

¹²²452 N.E.2d at 1008.

¹²³*Id.*

¹²⁴*Id.* at 1009. (citing *Kolosci v. Lindquist*, 47 F.R.D. 319 (N.D. Ind. 1969)).

¹²⁵452 N.E.2d at 1009.

¹²⁶*Id.* Additionally, the trial court committed no error when it read the deposition in question to examine the conduct of cross-examination solely with reference to a procedural matter and not with regard to the merits of the action. *Id.* Of course, Indiana case law requires that a deposition be published and admitted into evidence in order to be considered. *Gumz v. Starke County Farm Bureau Co-op. Ass'n*, 271 Ind. 694, 395 N.E.2d 257 (1979); *Augustine v. First Fed. Sav. & Loan Ass'n*, 270 Ind. 238, 384 N.E.2d 1018 (1979).

The procedure outlined in *Newton v. State*, 456 N.E.2d 736, 744 n.6 (Ind. Ct. App. 1983), concerning depositions and discovery evidence should be carefully noted. In *Newton*, a criminal case, the defendant argued that a seven-year-old witness gave trial testimony inconsistent with her deposition testimony. The court's review of the record showed that defendant had moved to publish the deposition, but later failed to offer the deposition or any parts thereof into evidence after it had been published. The court concluded that it was bound by the record on appeal and the appellant's arguments or allegations of contradictory testimony were outside the record and could not be considered. 456 N.E.2d at 744 n.6.

¹²⁷452 N.E.2d at 1009 n.4. *See, e.g.*, IND. R. TR. P. 37(A)(4). The Trial Rule does not permit an award of expenses and attorney fees in connection with obtaining the termination or limitation of a deposition, but does not specifically authorize an award for the cost of a portion of a deposition itself.

d. Trial Rules 34 and 37: Pre-trial preparation requirement.—In *Aamco Transmission v. Air Systems, Inc.*,¹²⁸ defendant Aamco was prevented from making an in-court examination or production of certain profit and loss summaries of the plaintiff company during trial. The trial court reasoned that such conduct was trial preparation and that such trial preparation work was impermissible during trial.¹²⁹

Aamco filed a pre-trial request for the production of all income ledgers to which the plaintiff failed to respond; yet Aamco did not move under Trial Rule 37(A)¹³⁰ to compel the plaintiff to comply with its request. Additionally, the request did not comply with the provisions in Trial Rule 34, concerning the production of documents, because it failed to specify a reasonable time, place, and manner for making the inspection.¹³¹ However, the principal attention given in the appellate court was to the fact that Aamco neglected to follow through with pre-trial discovery devices by failing to move for a Trial Rule 37 order.

The court of appeals sustained the trial court's refusal to permit Aamco to conduct in-court production of the documents. Aamco's neglect to carry through with discovery, when it might have been entitled to a pre-trial order compelling plaintiff's response at trial, led the court of appeals to sustain the trial judge's broad discretion with respect to discovery permitted during the course of trial.¹³²

The court emphasized that a trial court's discovery rulings will not be reversed without a showing of prejudice by the moving party, and that Aamco could not do so because it also failed to take advantage of Trial Rule 45(B) which provides for a subpoena to command the production of books, documents, and papers.¹³³ The court noted that if the defendant had adopted the subpoena procedure, a court order would have been unnecessary.¹³⁴

D. Trials and Judgments

1. Trial Rule 41: Voluntary Dismissal by Court Order.—The case of *Board of Commissioners v. Nevitt*,¹³⁵ contains a unique interpretation of the relationship between Trial Rules 15 and 41(A). Nevitt and his

¹²⁸459 N.E.2d 1215 (Ind. Ct. App. 1984), *transfer denied*, June 5, 1984.

¹²⁹*Id.* at 1219.

¹³⁰Trial Rule 37(A) allows a party to move the trial court for an order compelling discovery. See IND. R. TR. P. 37(A).

¹³¹See IND. R. TR. P. 34(B). The scope of Trial Rule 34 is fairly broad. See, e.g., *Allied Mills, Inc. v. P.I.G., Inc.*, 454 N.E.2d 1240, 1243 (Ind. Ct. App. 1983) (By request pursuant to Trial Rule 34, a shareholder's financial annual reports are properly discoverable when punitive damages are sought.).

¹³²459 N.E.2d at 1220.

¹³³See IND. R. TR. P. 45(B).

¹³⁴459 N.E.2d at 1220.

¹³⁵448 N.E.2d 333 (Ind. Ct. App. 1983), *transfer denied*, December 13, 1983.

wife brought suit against the Cass County Board of Commissioners (Board) and a county employee for personal injuries suffered by Nevitt. On the day before the trial, Nevitt was granted leave to file an amended complaint under Trial Rule 15(A), dropping his claim against the Board. Nevitt's wife, however, did not similarly drop her claim against the Board. The county employee was given notice of the amended complaint on the morning of the trial. The employee's attorney moved for a continuance, but that motion was denied. After a bench trial, the court entered judgment for Nevitt against the county employee for \$2,750,000 and for Nevitt's wife against the driver and Cass County for \$100,000.¹³⁶

The court of appeals examined Trial Rules 15(A) and 41(A)(2),¹³⁷ as well as several decisions in the area, and decided that the proper procedure in this situation is for a plaintiff to seek a voluntary dismissal under Trial Rule 41(A). The court reasoned that a construction of Trial Rule 15 which would allow a plaintiff to dismiss his claim against one party by amending his complaint under these circumstances would nullify the "terms and conditions" requirement that may be imposed by the court under Trial Rule 41(A)(2). Therefore, the court held that "a plaintiff who wishes to drop a defendant from his suit may not do so by amending his complaint, but must seek a voluntary dismissal under T.R. 41(A)."¹³⁸ Additionally, the court decided to treat the trial court's dismissal under Trial Rule 15 as if it were a dismissal under Trial Rule 41(A)(2), rather than remanding the case to the trial court for reconsideration.¹³⁹

After treating the trial court amendments as a dismissal under Trial Rule 41(A)(2), the court concluded that the dismissal was a final, appealable judgment as defined in Trial Rule 54(A),¹⁴⁰ a point upon which there was no previous Indiana authority. The dismissal of the Board, the court reasoned, resulted in the Board receiving a judgment within the meaning of the Indiana Tort Claims Act. Therefore, any further action against the employee was barred.¹⁴¹ The court also reasoned that its conclusion was not altered by Trial Rule 54(B) because that Rule has no bearing on what constitutes a judgment under the Tort Claims Act.¹⁴²

¹³⁶*Id.* at 335-36.

¹³⁷*See* IND. R. TR. P. 15(A) and 41(A)(2) (providing, respectively, for amendments to pleadings and voluntary dismissal by court order).

¹³⁸448 N.E.2d at 338 (footnote omitted).

¹³⁹*Id.*

¹⁴⁰*See* IND. R. TR. P. 54(A).

¹⁴¹The Indiana Tort Claims Act provides: "A judgment rendered with respect to or a settlement made by a governmental entity bars an action by the claimant against an employee whose conduct gave rise to the claim resulting in that judgment or settlement." IND. CODE § 34-4-16.5-5(a)(1982).

¹⁴²*See* IND. R. TR. P. 54(B). In so holding, the court extended several similar opinions. *See, e.g.,* Burks v. Bolerjack, 427 N.E.2d 887 (Ind. 1981); Teague v. Boone, 442 N.E.2d 1119 (Ind. Ct. App. 1982); Coghill v. Badger, 418 N.E.2d 1201 (Ind. Ct. App. 1981).

It is here suggested that these interpretations become quite difficult because they occurred in the context of a suit against a governmental agency. A better disposition in an appellate court decision interpreting a trial court rule for the first time, especially one resulting in the curtailment of trial court discretion under a still different rule, would be to remand to the trial court. A remand would permit the trial court to redetermine whether to exercise the discretion it initially invoked. This would seem particularly true in this case, where Nevitt's wife continued the litigation against the county. It would seem quite improbable for the county to suggest prejudice, insofar as the county might claim it had no opportunity to defend against a claim arising from the occurrence which precipitated both lawsuits.

2. *Trial Rule 50: Judgment on the Evidence.*—The quantum of evidence necessary for a plaintiff to avoid a directed verdict at the close of his evidence was addressed in *American Optical Co. v. Weidenhamer*.¹⁴³ Initially, the court agreed that the case was governed by the rules enunciated in *Mamula v. Ford Motor Co.*¹⁴⁴ The *Mamula* court stated, in essence, that the motion for a judgment on the evidence will be granted after considering only the evidence most favorable to the party against whom the motion is made, and then only when there is a *total absence of evidence* or legitimate inference in favor of the nonmoving party upon the issues.¹⁴⁵

The supreme court reinterpreted the *Mamula* language. It said that in determining whether or not evidence is sufficient for that purpose, both qualitative and quantitative analyses are necessary. If opposite conclusions could be reasonably drawn, then it cannot be said that the evidence was insufficient.¹⁴⁶ The key word is "reasonable," although in several opinions words such as "substantial" or "probative" have been used. Such words, the court stated, are helpful in articulating the methodology in Trial Rule 50 cases because they focus a trial court's attention upon the qualitative aspects of the issue. They may also tend to promote objectivity in these situations.¹⁴⁷

Quantitatively, evidence may fail only if it is absent. Qualitatively, however, evidence fails when it cannot be said, with reason, that the intended inference may logically be drawn. This may occur either because

¹⁴³457 N.E.2d 181 (Ind. 1983). For additional analysis of this case, see Liebman, *Products Liability, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 299, 300 (1985).

¹⁴⁴150 Ind. App. 179, 181, 275 N.E.2d 849, 851 (1971). The *Huff* standard is inapposite because that case involved a judgment on the evidence after the jury had returned a verdict.

¹⁴⁵*Id.* (quoting *Hendrix v. Harbelis*, 248 Ind. 619, 623, 230 N.E.2d 315, 318 (1967); *Rouch v. Bisig*, 147 Ind. App. 142, 147-48, 258 N.E.2d 883, 886 (1970)).

¹⁴⁶457 N.E.2d at 184.

¹⁴⁷*Id.*

of an absence of credible witnesses or because the intended inference may not be drawn without undue speculation.¹⁴⁸

The court, in using such words as "quantitatively" and "qualitatively" referred, of course, to the sufficiency of the evidence present, and not to its admissibility. The *Mamula* standard appears to have been very substantially rewritten by the Indiana Supreme Court in *American Optical*.

3. *Trial Rule 55(B): Default Judgment.*—*Horsley v. Lewis*¹⁴⁹ concerned the applicability of the three day notice and hearing provision of Trial Rule 55(B) when an attorney enters an appearance, files a responsive pleading, and then withdraws from the case. Lewis commenced an action against Horsley, who entered an appearance by an attorney; the attorney filed a responsive pleading and a denial. The case was set for trial after a status conference. Thereafter, Horsley's attorney withdrew from the case. He notified Horsley of that fact, and advised him that a default judgment could be entered against him. No further appearance was made by Horsley's counsel. Subsequently, Lewis filed an affidavit for default. On the same day the trial court entered the default judgment. No three day notice of the motion for default was served on Horsley.¹⁵⁰

In its opinion, the appellate court clarified the distinction between the appearance or withdrawal of an attorney as opposed to the litigant. If a party withdraws his appearance with permission of the court, the court is divested of jurisdiction. But if an attorney merely withdraws his own appearance, the party remains before the court.¹⁵¹ Because the responsive pleading was filed and not later withdrawn, the court concluded that the litigant (Horsley) had appeared for purposes of Trial Rule 55(B) and therefore notice of default was required.¹⁵² The default judgment was reversed because such notice was not given. The court distinguished *Stewart v. Hicks*,¹⁵³ where an entry of appearance by counsel *without filing an answer*, and the subsequent withdrawal of the appearance, made the defendant vulnerable to default without notice.

The decision of the court of appeals in *Hampton v. Douglass*¹⁵⁴ is closely related to the question addressed in *Horsley*. *Hampton*, a paternity action, entailed a judgment by default after the merits had been closed. Since no answer is required in a paternity action, the issues are closed

¹⁴⁸*Id.*

¹⁴⁹448 N.E.2d 41 (Ind. Ct. App. 1983).

¹⁵⁰*Id.* at 42.

¹⁵¹*Id.* at 43 (quoting *State ex rel. Durham v. Marion Circuit Court*, 240 Ind. 132, 162 N.E.2d 505, 507 (1959)).

¹⁵²448 N.E.2d at 43. See IND. R. TR. P. 55(B).

¹⁵³395 N.E.2d 308 (Ind. Ct. App. 1979).

¹⁵⁴457 N.E.2d 618 (Ind. Ct. App. 1983). For a further discussion of this case, see King, *Domestic Relations, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 211, 240 (1985).

by operation of law after the complaint is filed. The defendant had appeared but his counsel withdrew and neither the defendant nor his counsel appeared in court for trial on the trial date. The mother moved for default, received it due to the defendant's failure to attend the trial on the appointed date, and offered some evidence concerning expenses for the support award. Although the three day notice as required under Trial Rule 55(B) was not given, that issue was not dispositive because the court distinguished and disagreed with the *Horsley* decision on that question.

The court held that once the issues were closed, either by filing a responsive pleading or by operation of law, judgment by default is improper even if the defendant fails to appear for trial.¹⁵⁵ The trial court must proceed to hear the plaintiff's evidence as though the defendant was present and, if a prima facie case is established, then the trial court may render a judgment on liability only. Because a prima facie case was not established in *Hampton*, the court of appeals set aside the default, distinguishing *Horsley* in its opinion. The court based its holding on a 1931 court of appeals decision¹⁵⁶ and stated that default, as it is defined by the Indiana courts, would never be appropriate in paternity cases.

Presumably, under the reasoning in *Hampton*, a default judgment is never appropriate in any case in which the defending or answering party has appeared, even when the three day notice has been given, unless the moving party presents a prima facie case. If *Hampton* stands for this proposition, the decision is open to serious question. First, it seems contrary to the discretion allowed to the trial court by Trial Rule 55(B) when the three day notice has been given. The last sentence of Rule 55(B) plainly provides the trial court with discretion to enter judgment without the plaintiff showing a prima facie case if the facts in the particular case warrant such a proceeding. Second, *Hampton* places the serious and diligent party at a distinct disadvantage while favoring the careless, negligent, or obstinately absent party. Where the defaulting party has notice but fails to show, a three day or longer delay of the entire proceeding would occur. If the plaintiff is present and ready for trial, a delay of even three days would mean the plaintiff must bear the full expense for readiness and presumably repeat the process at least once again.

If the court had held that setting a trial date three days beyond the date of notice complies with the three day notice requirement under Trial Rule 55(B), then certainly the trial court would have the ability to enter a default if the party, failing to appear after notice, is not

¹⁵⁵*Id.* at 619.

¹⁵⁶*Indiana State Bd. of Medical Registration v. Packard*, 93 Ind. App. 171, 177 N.E. 870 (1931).

present. The remaining question would be whether or not the trial court must force the plaintiff to establish a prima facie case on "liability" in every case. If so, and *Hampton* appears to so require, then the last sentence of Rule 55(B) is eviscerated along with the discretion it vested in the trial court. This would mean that Trial Rule 55(B) had no effect on the 1931 court of appeals decision, or that none is to be recognized. However, the Rule plainly gives more discretion than *Hampton* intimates. Further, the Indiana Supreme Court decision of *Seibert Oxidermo, Inc. v. Shields*¹⁵⁷ regarding Trial Rules 55(C) and 60 is pertinent.

4. *Collateral Estoppel*.—In a unique opinion on collateral estoppel during the survey period, the Indiana Court of Appeals appeared to sanction the doctrine of nonmutual collateral estoppel, at least to a limited extent. *Board of Commissioners v. Whistler*¹⁵⁸ considered whether or not the trial court, in an action against a retirement fund, erred in failing to find the Board of Commissioners collaterally estopped from litigating an issue they had already lost in a prior action against the county auditor.

The court accepted without comment that three of the four requirements of collateral estoppel were unquestionably met: "(1) a court of competent jurisdiction rendered the judgment, (2) the issue . . . was determined in the first judgment, and (3) the judgment in the first case was on the merits."¹⁵⁹ The only real controversy concerned the identity of parties requirement.¹⁶⁰ The court resolved this issue with little difficulty, finding that "Indiana courts have carved out an exception to the identity of parties requirement when the judgment concerns local government."¹⁶¹ Thus, the court held collateral estoppel applied against the government entity as a plaintiff despite the lack of identity of parties in the two suits.¹⁶²

¹⁵⁷446 N.E.2d 332 (Ind. 1983).

¹⁵⁸455 N.E.2d 1149 (Ind. Ct. App. 1983), *transfer denied*, March 9, 1984.

¹⁵⁹*Id.* at 1155 (citing *Moxley v. Indiana Nat'l Bank*, 443 N.E.2d 374 (Ind. Ct. App. 1982); *Glass v. Continental Assurance Co.*, 415 N.E.2d 126 (Ind. Ct. App. 1981); *Peterson v. Culver Educ. Found.*, 402 N.E.2d 448 (Ind. Ct. App. 1980)).

¹⁶⁰*See* *Peterson v. Culver Educ. Found.*, 402 N.E.2d 448 (Ind. Ct. App. 1980); *Mayhew v. Deister*, 144 Ind. App. 111, 244 N.E.2d 448 (1969).

¹⁶¹455 N.E.2d at 1155.

"The authorities are almost unanimous in holding that, in the absence of a showing of fraud or collusion, a judgment against an officer of a local government, respecting matters which are of general and public interest, entered in an action where there was a bona fide controversy, is binding and conclusive upon all residents, citizens, and taxpayers of the local government."

Id. at 1155 (quoting *Simmons v. Woodward*, 217 Ind. 15, 20, 26 N.E.2d 37, 39 (1940)). *See also* *Oviatt v. Behme*, 238 Ind. 69, 147 N.E.2d 897 (1958).

¹⁶²455 N.E.2d at 1156. *Accord* *United States v. Stauffer Chem. Co.*, 104 S. Ct. 575 (1984) (government estopped to litigate same issue against separate plants of the same company).

The *Whistler* opinion must be compared with a recent United States Supreme Court case holding that the federal government may not be collaterally estopped from relitigating issues adjudicated *against it as a defendant*, when actions are brought by different parties as plaintiffs.¹⁶³ The result in *Whistler* then would seem to be substantially qualified when the government is a party-defendant, as a matter of policy, by the Supreme Court's decision.

E. Appeals

1. *Trial Rule 60: Relief from Judgment or Order.—a. Mistake, surprise, excusable neglect.*—Two recent cases involving Trial Rule 60(B) deserve careful attention. In *Boles v. Weidner*,¹⁶⁴ the plaintiff was injured in an automobile accident and brought suit against the defendants. The defendants were served with a complaint and summons, yet no appearance was made for the defendants. The plaintiff moved and received a default judgment for damages. Approximately nine months later, the defendants entered an appearance and moved to set aside the judgment, stating that the summons and complaint were given to their local insurance agency which was to notify the Hartford Insurance Group, defendants' insurer. The defendants said that "a breakdown in communications" between the local agency and Hartford resulted in Hartford not receiving notice of the suit.¹⁶⁵

The trial court granted the motion to set aside, based on the communications breakdown and observed that the plaintiff's counsel did not notify the insurance carrier (Hartford) of the suit.¹⁶⁶ Reversing the trial court, the Indiana Court of Appeals stated that it was not the duty of the plaintiff's counsel to notify the defendant's insurance carrier of the lawsuit.¹⁶⁷

On transfer to the Indiana Supreme Court, the trial court's judgment was sustained on the ground that, although it was not the responsibility of the plaintiff's counsel to give notification to the insurance carrier, it was permissible for the trial court to consider that factor in the exercise of its discretion in setting aside a default judgment pursuant to Trial Rule 60(B)(1).¹⁶⁸ The court sustained the general proposition that because of the "breakdown in communications" between the agent and the carrier, "neither of them was aware that the lawsuit was pending without the proper response of hiring an attorney and entering an appearance."¹⁶⁹

¹⁶³United States v. Mendoza, 104 S. Ct. 568 (1984).

¹⁶⁴449 N.E.2d 288 (Ind. 1983).

¹⁶⁵*Id.* at 289.

¹⁶⁶*Id.*

¹⁶⁷440 N.E.2d 720, 722 (Ind. Ct. App. 1982), *rev'd*, 449 N.E.2d 288 (Ind. 1983).

¹⁶⁸449 N.E.2d at 290.

¹⁶⁹*Id.* at 291. *See also* Lipscomb v. Markward, 457 N.E.2d 613 (Ind. Ct. App. 1983).

The gist of the *Boles* decision in the supreme court is that a "mistake in communication" existed even though the defendants received all of the notice to which they were entitled, and even though the plaintiff did not participate in, or cause the "failure of communication" between the insurance agent and the insurance carrier. This conclusion is significant in measuring the next opinion.

In *American Fletcher National Bank v. Pavilion, Inc.*,¹⁷⁰ also on transfer from the Indiana Court of Appeals, relief was sought under Trial Rule 60(B)(1) and (8). Plaintiff (AFNB) sought judgment on a promissory note. A bench trial resulted in a judgment for the defendants. AFNB filed a motion to correct error, which the trial court overruled. A notice of the motion's disposition from the clerk's office showed a handwritten date. That date was not the date of the ruling on the motion to correct error; rather, it was the date on which the card was mailed. However, the attorney representing AFNB thought the date on the notice was the date of the court's ruling. As a result, AFNB attempted to perfect an appeal by filing the record of proceedings which the clerk of the court of appeals refused as untimely.¹⁷¹

AFNB sought relief under Trial Rule 60 asking for a *nunc pro tunc* entry to change the date of the ruling on the motion to correct error, which the trial court granted. Eventually, AFNB perfected its appeal and the defendants cross-appealed. The court of appeals held that the trial court did not abuse its discretion in granting AFNB's Trial Rule 60(B) motion and, therefore, the appeal was timely perfected.¹⁷²

The supreme court decided, however, that the trial court erred in granting AFNB relief under Trial Rule 60(B)(1) and (8).¹⁷³ The reasoning of the supreme court was that no mistake occurred because there was no misinformation from the clerk to the party's attorney. Rather, the court characterized the notice as incomplete information. Moreover, there was neither a lack of notice to the attorney involved nor an affirmative or direct manifestation of false information from the clerk's office.¹⁷⁴

¹⁷⁰453 N.E.2d 156 (Ind. 1983).

¹⁷¹*Id.* at 156-57.

¹⁷²434 N.E.2d 896, 898 (Ind. Ct. App. 1982), *rev'd*, 453 N.E.2d 156.

¹⁷³453 N.E.2d at 159. Trial Rule sections 60(B)(1) and (8) provide:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, proceeding, or final judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect;

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

IND. R. TR. P. 60(B)(1), (8).

¹⁷⁴453 N.E.2d at 159. The supreme court specifically distinguished and interpreted its decision in *Soft Water Utilities, Inc. v. LeFevre*, 261 Ind. 260, 301 N.E.2d 745 (1973). In *Soft Water*, a party's attorney was given misinformation from the clerk which the court stated was affirmatively misleading.

The court held that the trial court abused its discretion in granting AFNB's Trial Rule 60(B) motion to set aside and reenter the denial of the motion to correct error. Thus, the court concluded that AFNB did not perfect a timely appeal and dismissed the appeal.¹⁷⁵

The decision appears to substantially qualify the relief formerly available under *Soft Water Utilities, Inc. v. LeFerre*.¹⁷⁶ Under *Soft Water Utilities* and its progeny, the scope of appellate review of a trial court's decision on a Trial Rule 60(B) motion was limited to an abuse of discretion standard. After *Pavilion* where the notice of a court's ruling, order, or judgment is at issue, relief under Trial Rule 60(B)(8) appears to be available only when there was some positive act of misinformation or a misleading misrepresentation by the clerk's office which caused the lack of understanding and the entry of a judgment from which relief is sought. Central to the *Pavilion* decision was Trial Rule 72(D), which provides in part that lack of notice of entry by the clerk does not affect the time for appeal.¹⁷⁷ Clearly, the supreme court interpreted Trial Rule 72(D) as a limitation upon the trial court's discretion to grant relief even when it is clear that a genuine mistake, as in *Pavilion*, is present. This trend¹⁷⁸ is troublesome because the appellate courts are changing the usual rule that a Rule 60 motion is an appeal to the discretion of the trial court, and that the lower court decision will be disturbed only for an abuse of discretion.¹⁷⁹

Although there was no misinformation or lack of notice, there was certainly a "failure of communication" which was even greater than the failure in the *Boles* decision. There is not, it seems, a principled explanation for the distinction in cases involving Rule 72(D) requiring affirmative misinformation before allowing relief under Rule 60(B)(8).¹⁸⁰ If a failure of communication between two insurance company offices, or between an insured and an insurer, may be a basis for relief under Rule 60(B), as in *Boles*, it is difficult to reconcile why a failure of communication between the clerk's office and an attorney cannot result in relief to the attorney's client. The only reasoned explanation offered by the Indiana Supreme Court concerns an attorney's duty to check the

¹⁷⁵453 N.E.2d at 159.

¹⁷⁶261 Ind. 260, 301 N.E.2d 745 (1973). See, e.g., *State ex rel. Janesville Auto v. Superior Court*, 270 Ind. 585, 387 N.E.2d 1330 (1979); *First Nat. Bank & Trust Co. v. Colling*, 419 N.E.2d 1326 (Ind. Ct. App. 1981).

¹⁷⁷See IND. R. TR. P. 72 (D). See also *Patton Elec. Co. v. Gilbert*, 459 N.E.2d 1192 (Ind. Ct. App. 1984); *McIlwain v. Simmons*, 452 N.E.2d 430 (Ind. Ct. App. 1983); *Spence v. Supreme Heating & Air Conditioning Co.*, 442 N.E.2d 1144 (Ind. Ct. App. 1982); *Bilchert v. Brosoky*, 436 N.E.2d 1165 (Ind. Ct. App. 1982).

¹⁷⁸See cases cited *supra* note 177.

¹⁷⁹See, e.g., *Matherly v. Matherly*, 457 N.E.2d 220 (Ind. 1984).

¹⁸⁰Compare *American Fletcher Nat. Bank & Trust Co. v. Pavilion*, 453 N.E.2d 156 (Ind. 1983) with *Matherly v. Matherly*, 457 N.E.2d 220 (Ind. 1984) and *Boles v. Weidner*, 449 N.E.2d 288 (Ind. 1983).

court records and learn of court entries. One can grant that general duty but reply that an attorney for a defendant has a duty to file an answer to a complaint which is timely filed. The failure to perform that duty is not different from the failure under Rule 72(D), but Indiana cases make a clear, hard, and inexplicable distinction between the two conditions under Trial Rule 60(B).

b. Repetitive motions and modification of an injunction.—In *Saint Joseph's Hospital v. Women's Pavilion*,¹⁸¹ repetitive motions under Trial Rule 60(B) were at issue. Such repetitive motions are very strongly discouraged, or will not be considered, unless certain qualifications are clearly shown.¹⁸² The facts of *Saint Joseph's Hospital* meet one such qualification; namely, where the movant is unaware of certain facts or consequences at the time the first motion is filed, a second motion will be considered.¹⁸³ In this case, a modification of law occurred after the denial of the movant's first motion under Trial Rule 60(B).

Accordingly, the court of appeals held that the movant could not have requested relief in the first motion on the basis of a change in law and, therefore, was not preempted or foreclosed from seeking relief pursuant to a second motion under Trial Rule 60(B).¹⁸⁴ Only where an extraordinary change has occurred will a second or repetitive motion under Trial Rule 60(B) be entertained or reviewed on appeal pursuant to appellate review principles.

Additionally, because of a change in the law under a decision in the court of appeals, one party in the case filed a motion seeking modification of an injunction. The modification was granted by the trial court.¹⁸⁵

On appeal, the court of appeals stated that, although it could find no Indiana precedent specifically providing for relief from judgments of prospective application (such as injunctions) when the law has subsequently changed, there was no sufficient reason to limit the application of Trial Rule 60(B)(7) when equity demanded otherwise.¹⁸⁶ The court noted that the Indiana provision is the functional equivalent of Federal

¹⁸¹451 N.E.2d 1126 (Ind. Ct. App. 1983).

¹⁸²*See, e.g., Siebert Oxidermo Inc. v. Shields*, 446 N.E.2d 332 (Ind. 1983).

¹⁸³451 N.E.2d at 1128.

¹⁸⁴*Id.* at 1129.

¹⁸⁵*Id.* at 1127.

¹⁸⁶*Id.* at 1130. Trial Rule 60(B)(7) provides:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an order, entry of default, proceeding, or final judgment, including a judgment by default, for the following reasons:

(7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application .

IND. R. TR. P. 60(B)(7).

Rule 60(b)(5), and that federal precedent supported a broad application of the “no longer equitable” clause.¹⁸⁷

2. *Appellate Jurisdiction.—Affidavits with Petitions to Transfer.*—The opinion in *Indiana Education Employment Relations Board v. Mill Creek Classroom Teachers*¹⁸⁸ contains an important holding concerning the use of affidavits with regard to petitions to transfer from the Indiana Court of Appeals to the Indiana Supreme Court. A dispute arose between the parties because the school board did not maintain the status quo and withheld salary increases provided under a prior contract, pending agreement on a new contract. The court of appeals held that the case became moot because the parties had reached an agreement which included the payment in full of all incremental changes withheld during the negotiations, and therefore denied the appeal.¹⁸⁹

However, on transfer the supreme court noted that the law in Indiana is well-settled that although a specific issue may be moot among parties in the case, the fact that it recurs year after year and is of great public interest is sufficient to allow the issue to be considered on its merits. Because of the general public interest in encouraging harmonious labor relations between a school board and its employees and the recurring nature of the issue, the court concluded that the case should be considered on its merits and proceeded to address the question.¹⁹⁰

The evidence which caused the supreme court to conclude that the issue was not moot, although an agreement was reached among the parties to the action, was presented to the court by means of affidavits accompanying the petition to transfer from the court of appeals. Although the supreme court agreed that the issue was moot with respect to the parties in the instant case, the affidavits showed “that salary increments have been denied to teachers during the status quo period in at least twelve school corporations during the last two years.”¹⁹¹ Note well that this evidence did not concern the dispute between the parties; rather, the information concerned other school systems where those same conditions had occurred.

F. Statutory and Rule Amendments¹⁹²

1. *Appellate Rule 2(C): Court of Appeals PreAppeal Conference.*—The Indiana Supreme Court amended Appellate Rule 2(C) effective March

¹⁸⁷451 N.E.2d at 1130 (citing *Public Serv. Comm’n v. Schaller*, 157 Ind. App. 625, 299 N.E.2d 625 (1973)).

¹⁸⁸456 N.E.2d 709 (Ind. 1983). For a further discussion of this case, see Archer, *Labor Law, 1984 Survey of Recent Developments in Indiana Law*, 18 Ind. L. Rev. 291, 297 (1985).

¹⁸⁹*Id.* at 710-11.

¹⁹⁰*Id.* at 712.

¹⁹¹*Id.* at 711.

¹⁹²See Harvey, *The Judicial Assault on the Attorney-Client Relationship: Thoughts on the 1983 Amendments to the Federal Rules of Civil Procedure*, 1 BENCHMARK 17

8, 1984. The amendment requires that in civil appeals taken to the court of appeals the appellant shall file, within ten days of filing the praecipe with the clerk of the trial court, a copy of the praecipe, a copy of the motion to correct error and the ruling thereon, a statement of the nature of the case, and the judgment entered with the clerk of the supreme court and the court of appeals. *The failure to file this pre-trial document within the ten day period prescribed will forfeit the right to appeal.*

There is some history behind this amendment. The rule in its original form did not require the forfeiture of an appeal if the copies of the praecipe and the other documents were not filed in the office of the clerk of the court of appeals. However, the court of appeals began to administer the rule in that manner. It dismissed approximately a dozen cases, all of which were transferred to the supreme court. That court, in essence, reinstated all the cases. Immediately after the issuance of the order, however, the supreme court amended Rule 2(C). Thus, there is another jurisdictional prerequisite to perfecting an appeal to the court of appeals in civil cases.

2. *Punitive Damages.*—Indiana Code section 34-4-30-1 was amended during the survey period:

If a person suffers a pecuniary loss as a result of a violation of IC 35-43, he may bring a civil action against the person who caused the loss for:

- (1) an amount *not to exceed* three (3) times his actual damages;
- (2) the costs of the action; and
- (3) a reasonable attorney's fee.¹⁹³

The change in this section is substantial as the previous language provided for treble damages¹⁹⁴ while the statute now allows a maximum of three times actual damages.

The same legislative act also established a new section:

it is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action. However, a person may not recover both:

- (1) punitive damages; and
- (2) the amounts provided for under section 1 of this chapter.¹⁹⁵

The new section also established a standard of proof in cases involving punitive damages, which is proof by "clear and convincing evidence"

(Mar.-Apr. 1984) (the author's criticism of amendments to Federal Rules of Civil Procedure 7, 11, 16, and 26 which were enacted during the survey period).

¹⁹³Act of Feb. 29, 1984, Pub. L. No. 172-1984, § 1, 1984 Ind. Acts 1462 (codified as amended at IND. CODE § 34-4-30-1 (Supp. 1984)).

¹⁹⁴IND. CODE § 34-4-30-1 (1982).

¹⁹⁵Act of Feb. 29, 1984, Pub. L. No. 172-1984, § 2, 1984 Ind. Acts 1462 (codified at IND. CODE § 34-4-30-2 (Supp. 1984)).

of all the facts that are relied upon by the person or plaintiff to support his recovery for punitive damages.¹⁹⁶

3. *Collection of Witness Fees.*—A new article, Indiana Code 33-17, was added as part of an attempt to recodify the laws relating to circuit court clerks.¹⁹⁷ Of particular interest is chapter 12, relating to the collection of fees belonging to individuals, which provides for the collection and disbursement of witness fees by the clerk.¹⁹⁸ While this chapter was purportedly intended as a recodification of existing law, it is not. Moreover, the statutory provision is directly contrary to Trial Rule 45(G)¹⁹⁹ and previous practice whereby the attorney paid the fee directly to the witness. Consequently, the legislature should strive to resolve this inconsistency; however, as a matter of procedure, the Trial Rules govern.

¹⁹⁶Act of Feb. 29, 1984, Pub. L. No. 172-1984, § 3, 1984 Ind. Acts 1462 (codified at IND. CODE § 34-4-30-2 (Supp. 1984)).

¹⁹⁷Act of Mar. 1, 1984, Pub. L. No. 171-1984, § 1, 1984 Ind. Acts 1393, 1393-1415 (codified at IND. CODE 33-17 (Supp. 1984)).

¹⁹⁸Act of Mar. 1, 1984, Pub. L. No. 171-1984, § 1, 1984 Ind. Acts 1393, 1413-15 (codified at IND. CODE § 33-17-12-1 to-3 (Supp. 1984)).

¹⁹⁹Trial Rule 45(G) provides:

Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person who shall be required to attend outside his county of residence as provided in section (C), and by so tendering to him the fees for one [1] day's attendance and the mileage allowed by law. Such tender shall not be required to be made to a party who is subpoenaed or to an officer, employee, agent or representative of a party which is an organization, including the estate or any governmental organization, who is being examined upon any matter connected in any way with his employment or with duties to the organization.

IND. R. TR. P. 45(G).

APPENDIX A

INDIANA JUDICIAL REPORT FOR 1983
TOTAL CASES FILED IN 1983
SUMMARY

| | Circuit, Superior, & Probate Courts | Marion Municipal Courts | County Courts & County Court Function Courts | Total |
|-------------------------|--|----------------------------|--|---------|
| Felony | 14,146 | -0- | 7,386 | 21,532 |
| Misdemeanor | 2,661 | -0- | 61,075 | 63,736 |
| Criminal* | -0- | 53,377* | -0- | 53,377* |
| Re-Docketed Criminal | 3,944 | 3 | 5,055 | 9,002 |
| Juvenile | 28,596 | -0- | -0- | 28,596 |
| Civil (Plenary) | 54,907 | 10,729 | 3,389 | 69,025 |
| (Small Claims) | -0- | -0- | 98,625 | 98,625 |
| Re-Docketed Civil | 15,155 | 6,191 | 52,945 | 74,291 |
| Dissolution | 43,158 | -0- | -0- | 43,158 |
| Re-Docketed Dissolution | 32,557 | -0- | -0- | 32,557 |
| Probate/Adoption | 20,949 | -0- | -0- | 20,949 |
| Non-Felony Traffic** | -0- | -0- | 111,412 | 111,412 |
| Infractions** | -0- | 99,769 | 180,023 | 279,792 |
| Guardianship | 5,914 | -0- | -0- | 5,914 |
| Other | 10,432 | -0- | 4,001 | 14,433 |
| TOTAL | 232,419 | 170,069 | 523,911 | 926,399 |

*Marion Municipal Courts' criminal caseload is combined and includes misdemeanors and felonies.

**By reason of reporting procedures, a clear distinction cannot be made between Non-Felony Traffic cases and Infractions.

APPENDIX B
INDIANA JUDICIAL REPORT FOR 1983
TOTAL CASES DISPOSED IN 1983
SUMMARY

| | Circuit, Superior, & Probate Courts | Marion Municipal Courts | County Courts & County Court Function Courts | Total |
|-------------------------|--|----------------------------|--|---------|
| Felony | 15,088 | -0- | 6,116 | 21,204 |
| Misdemeanor | 2,652 | -0- | 61,931 | 64,583 |
| Criminal* | -0- | 42,776* | -0- | 42,776* |
| Re-Docketed Criminal | 3,515 | 3 | 4,512 | 8,030 |
| Juvenile | 27,491 | -0- | -0- | 27,491 |
| Civil (Plenary) | 59,315 | 12,012 | 3,346 | 74,673 |
| (Small Claims) | -0- | -0- | 100,555 | 100,555 |
| Re-Docketed Civil | 12,539 | 5,439 | 49,807 | 67,785 |
| Dissolution | 43,640 | -0- | -0- | 43,640 |
| Re-Docketed Dissolution | 31,048 | -0- | -0- | 31,048 |
| Probate/Adoption | 19,394 | -0- | -0- | 19,394 |
| Non-Felony Traffic** | -0- | -0- | 111,571 | 111,571 |
| Infractions** | -0- | 94,562 | 173,340 | 267,902 |
| Guardianship | 4,982 | -0- | -0- | 4,982 |
| Other | 9,950 | -0- | 3,564 | 13,514 |
| TOTAL | 229,614 | 154,792 | 514,742 | 899,148 |

*Marion Municipal Courts' criminal caseload is combined and includes misdemeanors and felonies.

**By reason of reporting procedures, a clear distinction cannot be made between Non-Felony Traffic cases and Infractions.

APPENDIX C
INDIANA JUDICIAL REPORT FOR 1983
1983 METHOD OF DISPOSITION
SUMMARY

| | Circuit, Superior, & Probate Courts | Marion Municipal County Court | County Courts & Function Courts | Total |
|--------------------|--|----------------------------------|------------------------------------|--------|
| Jury Trial | | | | |
| Felony | 1,050 | -0- | 113 | 1,163 |
| Misdemeanor | 31 | -0- | 148 | 179 |
| Criminal* | -0- | 532* | -0- | 532 |
| Civil (Plenary) | 719 | 71 | 19 | 809 |
| (Small Claims) | -0- | -0- | -0- | -0- |
| Non-Felony Traffic | -0- | -0- | 85 | 85 |
| TOTAL | 1,852 | 622 | 365 | 2,839 |
| Bench Trials | | | | |
| Felony | 1,190 | -0- | 506 | 1,696 |
| Misdemeanor | 217 | -0- | 6,109 | 6,326 |
| Criminal* | -0- | 14,456* | -0- | 14,456 |
| Juvenile | 14,876 | -0- | -0- | 14,876 |
| Civil (Plenary) | 15,876 | 3,044 | 545 | 19,465 |
| (Small Claims) | -0- | -0- | 21,631 | 21,631 |
| Re-Docketed Civil | 6,427 | -0- | 19,990 | 26,417 |

| | | | | |
|-------------------------|---------|---------|---------|---------|
| Dissolution | 29,877 | -0- | -0- | 29,877 |
| Re-Docketed Dissolution | 21,063 | -0- | -0- | 21,063 |
| Non-Felony Traffic | -0- | -0- | 3,291 | 3,291 |
| Infractions | -0- | 50,850 | 3,578 | 54,428 |
| TOTAL | 113,752 | 68,350 | 55,540 | 237,642 |
| Settled | 13,380 | 1,350 | 25,335 | 40,065 |
| Guilty Pleas | | | | |
| Felony | 8,435 | -0- | 3,771 | 12,206 |
| Misdemeanor | 1,775 | -0- | 36,901 | 38,676 |
| Criminal* | -0- | 12,414* | -0- | 12,414 |
| Non-Felony Traffic | -0- | -0- | 29,766 | 29,766 |
| Infractions | -0- | 30,658 | 46,052 | 76,710 |
| Dismissed | 4,553 | 32,247 | 80,097 | 116,897 |
| Default | 15,466 | 4,790 | 51,830 | 72,086 |
| Violations Bureau | -0- | -0- | 162,564 | 162,564 |
| Venued Out | 5,775 | 219 | 362 | 6,356 |
| Transferred Out | 1,396 | -0- | 1,322 | 2,718 |
| Closed | 8,553 | -0- | -0- | 8,553 |
| Failure to Appear | -0- | -0- | 9,341 | 9,341 |
| TOTAL | 229,614 | 154,792 | 514,742 | 899,148 |

*Marion Municipal Courts' criminal caseload is combined and includes misdemeanors and felonies.

IV. Constitutional Law

NORA L. MACEY*

A. *The Void for Vagueness Doctrine: Due Process and First Amendment Rights*

The Seventh Circuit decided cases involving challenges to the facial validity of an Indiana drug paraphernalia statute and an Indianapolis loitering ordinance. In both cases, the laws were alleged to be impermissibly vague and to impinge on protected first amendment conduct. The court, however, approached the two cases in markedly different ways.

1. *Indiana Drug Paraphernalia Act.—Nova Records, Inc. v. Sendak*¹ considered and rejected a challenge to Indiana's 1980 drug paraphernalia law, which imposes criminal penalties on individuals who manufacture, sell, or possess materials intended to facilitate or enhance illegal drug use.² Two previous attempts by the Indiana legislature to regulate dealing in drug paraphernalia had been sidetracked by constitutional challenges.³ The current enactment fared better both because of changes in the statutory language and changes in the legal standards applied by the court.

The Indiana Act provides, in relevant part:

A person who knowingly or intentionally manufactures or designs an instrument, device, or other object that he intends to be used primarily for:

- (1) introducing into the human body a controlled substance;
 - (2) testing the strength, effectiveness, or purity of a controlled substance; or
 - (3) enhancing the effect of a controlled substance:
- in violation of this chapter, commits manufacture of paraphernalia, a Class D felony.⁴

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¹1706 F.2d 782 (7th Cir. 1983).

²IND. CODE § 16-6-8.5-5 (repealed 1981) (similar versions at IND. CODE §§ 16-6-8.5-5.1, 35-48-4-8.1, 35-48-4-8.2, 35-48-4-8.3 (1982)).

³The 1975 enactment was repealed after it was temporarily enjoined by one member of a three judge court. The 1977 enactment was declared unconstitutionally vague by a three judge court in *Indiana Chapter, NORML v. Sendak*, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980). The 1977 law was repealed and superceded by the current law, Act of Mar. 3, 1980, Pub. L. No. 115-1980, 1980 Ind. Acts 1303, which was the subject of this appeal. 706 F.2d at 783-44.

⁴IND. CODE § 35-48-4-8.1 (1982).

Subsequent sections of the statute simply substitute the words "delivers/dealing"⁵ and "possesses/possession"⁶ for "manufactures/manufacture," to express the statute's additional prohibitions against dealing in and possession of paraphernalia. A separate section provided for forfeiture of items including books, records, and other materials "used or intended for use" in violation of statutes regulating controlled substances.⁷

Plaintiffs claimed that this language is impermissibly vague because it fails to provide adequate notice of the precise kinds of items prohibited or sufficient guidelines to preclude arbitrary enforcement.⁸ Plaintiffs noted particularly that the Indiana statute contains no list of examples of prohibited items and no identification of factors relevant to determining whether or not an item is being marketed in violation of this statute. By contrast, the inclusion of lists of examples and factors is one feature of the Model Drug Paraphernalia Act which has led to its approval by courts, including the Seventh Circuit.⁹ Although the Indiana law is similar to the Model Act, plaintiffs argued that its omission of the Model Act's list of examples and factors rendered it irretrievably vague on its face.¹⁰

The Seventh Circuit rejected this argument relying on the United States Supreme Court's decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,¹¹ which approved a municipal licensing ordinance regulating the sale of drug paraphernalia, defined in the ordinance as items "designed or marketed for use" with illegal drugs.¹² The Court in *Hoffman* recognized that courts may tolerate varying degrees of vagueness depending on the nature of the challenged law; economic regulations, regulations with civil rather than criminal penalties, and regulations which do not interfere with first amendment rights may satisfy a less stringent vagueness test.¹³ The licensing ordinance in *Hoffman* was characterized as essentially business regulation, but the Court noted that its "quasi-criminal" prohibitory and stigmatizing effect might require "a relatively strict test."¹⁴ In any event, the Court found the

⁵*Id.* § 35-48-4-8.2.

⁶*Id.* § 35-48-4-8.3

⁷IND. CODE § 16-6-8.5-5 (repealed 1981) similar version at § 16-6-8.5-5.1 (1982)).

⁸706 F.2d at 789. *Accord* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

⁹*Camille Corp. v. Phares*, 705 F.2d 223 (7th Cir. 1983).

¹⁰706 F.2d at 789.

¹¹455 U.S. 489 (1982).

¹²*Id.* at 492. In *Hoffman Estates*, the Supreme Court reversed a decision of the Seventh Circuit, *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981), which found the drug paraphernalia ordinance vague on its face.

¹³455 U.S. at 498.

¹⁴*Id.* at 499 (footnote omitted).

Hoffman ordinance “sufficiently clear” under the test for either quasi-criminal or criminal laws.¹⁵

Relying on these observations in the Supreme Court’s decision, the Seventh Circuit adopted the standards applied to the business related licensing ordinance in *Hoffman* to approve the broader criminal prohibitions in the Indiana Act.¹⁶ The appeals court gleaned from *Hoffman* four guiding principles for its analysis of the statute’s vagueness: (1) the dual focus of the vagueness inquiry is whether the law is sufficiently clear to provide adequate notice and preclude arbitrary or discriminatory enforcement; (2) an otherwise vague statute may be saved by an adequate scienter requirement; (3) courts should not presume that facial vagueness will not be cured by a future pattern of enforcement of subsequently adopted guidelines; and (4) a law is unconstitutionally vague “only if it is ‘vague in all of its applications [in the sense that] no standard of conduct is specified at all.’”¹⁷

The court held that the Indiana Act was not impermissibly vague under these standards, relying principally on the scienter requirement of the statute.¹⁸ The court read the Indiana law to prohibit individuals from manufacturing, selling, or possessing items only if they personally intend them to be used with illegal drugs. In the court’s view, the requirement that a specific illegal intent be proved compensates for the lack of examples of prohibited items and the absence of a list of factors relevant to distinguishing legal from illegal conduct.¹⁹

The scienter requirement also obviated any first amendment problems. In the court’s view, protected speech of a political nature, such as books or posters advocating reform of drug laws, is excluded because not intended within the meaning of the statute to facilitate or enhance the use of illegal drugs.²⁰ Speech, symbolic or otherwise, encouraging drug

¹⁵*Id.* at 500.

¹⁶706 F.2d at 787. By contrast, the Seventh Circuit had earlier held that “criminal legislation not restricted to economic or business activity” requires “a somewhat more searching examination” than the Supreme Court’s approach to the licensing ordinance in *Hoffman*. *Record Head Corp. v. Sachen*, 682 F.2d 672, 676 (7th Cir. 1982).

¹⁷706 F.2d at 787 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 497 & n.7 (1982) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

¹⁸706 F.2d at 789-90.

¹⁹*Id.* at 790. Compare *Record Head Corp. v. Sachen*, 682 F.2d 672 (7th Cir. 1982), in which the court found the scienter requirements in the challenged ordinance insufficient to cure the ordinance’s vagueness in identifying the items prohibited and in enunciating the factors for determining prohibited conduct. The court in *Nova Records* distinguished its holding in *Record Head* on the ground that the *Record Head* scienter requirement was “circular,” although it acknowledged that the ordinance in *Record Head*, read in its entirety, could have supported the finding of an adequate scienter requirement. 706 F.2d at 790 n.6.

²⁰706 F.2d at 788.

use itself is a form of unprotected commercial speech "proposing illegal activity [which] can be regulated or banned entirely."²¹

Finally, the court concluded that the Indiana Act is not vague on its face because it is "capable of constitutional application," and any risk of arbitrary enforcement which might result from the inadequacy of the statute's guidelines could be better raised in a post enforcement challenge to the law as applied.²² In so doing, the court retreated from an earlier, more searching, approach to vagueness inquiries in this context which had been criticized by the Supreme Court in *Hoffman*.²³ The Seventh Circuit decision reversed by the Supreme Court in *Hoffman* was based in part on the the court's concern that the ordinance's enforcement would be used "to harass individuals choosing lifestyles and views different from those of the majority culture."²⁴ In invalidating the *Hoffman* ordinance, the court of appeals had not presumed good faith enforcement, but searchingly examined the vagueness inherent in the language of the ordinance and speculated as to instances in which it might be improperly applied.²⁵

By contrast, in *Nova Records* the Seventh Circuit had no hesitation in applying the very deferential standards of *Hoffman* to a statute which, unlike the *Hoffman* ordinance, regulates individual as well as business conduct and which contains substantial criminal penalties.²⁶ The wholesale adoption of *Hoffman* standards with respect to criminal statutes is contrary to the Seventh Circuit's own pronouncement less than a year earlier in *Record Head Corp. v. Sachse*.²⁷ Moreover, previous Seventh Circuit decisions had required drug paraphernalia statutes to contain both a list of examples and an intent requirement.²⁸ In these cases, the

²¹*Id.* (citation omitted).

²²*Id.* at 792.

²³See *Flipside, Hoffman Estates v. Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981), *rev'd*, 455 U.S. 489 (1982).

²⁴*Flipside, Hoffman Estates v. Village of Hoffman Estates*, 639 F.2d 373, 384 (7th Cir. 1981).

²⁵*Id.*

²⁶706 F.2d 782. Violation of the Indiana statute with respect to manufacture, sale, or possession of drug and paraphernalia is a Class D Felony, punishable under Indiana law by imprisonment for a fixed term of two years and a fine up to ten thousand dollars. The term of imprisonment may be doubled under aggravating circumstances. IND. CODE § 35-50-2-7 (1982).

²⁷682 F.2d 672 (7th Cir. 1982). See *supra* note 16. But see *Record Head*, 682 F.2d at 682 (Pell, J., dissenting).

²⁸As the Seventh Circuit stated in *Levas & Levas v. Village of Antioch*, 684 F.2d 446 (7th Cir. 1982):

Thus there is a large, but not entirely amorphous class of items that can be paraphernalia, and an intent requirement that differentiates innocent transfers of multi-purpose items from illegal transfers of drug paraphernalia. That combination satisfies the fair notice aspect of the vagueness test, even in its strictest form.

Id. at 452. See also *Camille Corp. v. Phares*, 705 F.2d 223, 227 (7th Cir. 1983).

statute's scienter requirement was relevant, but not conclusive, in determining whether or not the regulation satisfied the "fair notice" half of the vagueness test. Under *Nova Records*, the statute's scienter provision by itself appears to satisfy the constitutional requirement of fair notice.

The presence of a scienter requirement, however, does not provide protection against the risk of arbitrary enforcement, an equally important concern underlying the void for vagueness doctrine.

The court's decision in *Nova Records*, approving a statute which contains no list of factors to aid in distinguishing legal from prohibited conduct, does not persuasively demonstrate how the risks of arbitrary enforcement with which the court had been concerned in its previous decisions,²⁹ are reduced by a statute without definitions or guidelines for enforcement. Moreover, the court had stated unequivocally in a prior decision that the reliance on the possibility of subsequent guidelines and patterns of enforcement to cure facial vagueness, which the Supreme Court approved in *Hoffman*, is simply not appropriate for criminal statutes.³⁰ The *Nova Records* decision, however, relaxed the court's previous standards for reviewing vagueness challenges to criminal statutes. Under these more deferential standards, the Indianapolis drug paraphernalia law finally received judicial approval.

2. *Indianapolis Loitering Ordinance.*—*Waldron v. McAtee*³¹ presented the Seventh Circuit with a challenge to an Indianapolis loitering ordinance alleged to be unconstitutionally vague both on its face and as applied. The ordinance prohibits "loitering" or "prowling" "at a time or in a manner not usual for law abiding citizens" or "under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity" if the loitering creates "danger of a breach of the peace" or "the unreasonable danger of a disturbance to the comfort or repose of any person acting lawfully in the public way."³² The ordinance authorizes police officers to arrest any individual in apparent violation of these prohibitions if the individual refuses to move on or fails to give the police officer a "lawful reason" for his conduct. Violators are subject to fines up to five hundred dollars.³³

The ordinance was challenged by the plaintiff, Waldron, who alleged that he was accosted and detained by policemen while talking with friends near the downtown public library just after midnight. According to Waldron's affidavit, the police officers threatened to arrest him under the loitering ordinance unless he moved on and warned him that he would be arrested in the future if he met with friends in the same place

²⁹See *supra* notes 27-28.

³⁰682 F.2d at 678.

³¹723 F.2d 1348 (7th Cir. 1983).

³²MARION COUNTY, IND., CODE § 20-9(a) (1979).

³³*Id.* § 20-9(f). The ordinance is reproduced in full in an appendix to the decision of the district court. *Waldron v. McAtee*, 556 F. Supp. 101, 106 (S.D. Ind.), *vacated*, 723 F.2d 1348 (7th Cir. 1983).

at that time of night. Waldron asserted that since this incident he has avoided meeting with friends or engaging in other activities in the downtown area at night for fear of arrest under the loitering ordinance. Alleging that the ordinance is vague on its face and as applied to his conduct, Waldron sought an injunction against its enforcement. The district court, however, concluded that the ordinance was directed only at conduct and speech not protected by the first amendment, and ruled that it was not impermissibly vague under existing authority construing similar language in other contexts.³⁴ On appeal, the Seventh Circuit declined to review the district court's decision on its merits. Instead, on its own initiative, it invoked the doctrine of abstention, ordering the court to vacate its previous orders and stay further proceedings until the Indiana courts had an opportunity to construe the Indianapolis loitering ordinance. As there was no state litigation pending on the issue, the court, in effect, required Waldron to institute and pursue a state declaratory judgment action as a prerequisite to federal jurisdiction of his constitutional claims.³⁵

Under the doctrine of abstention, a federal court, in appropriate cases, defers ruling on a federal claim over which it has jurisdiction until a state court has had an opportunity to rule on a question of state law which may obviate the need for federal action.³⁶ In *Baggett v. Bullitt*,³⁷ the United States Supreme Court held that abstention was not appropriate where plaintiffs challenged as void for vagueness state loyalty oath regulations for teachers and other public employees, even though the state courts had never had an opportunity to construe the challenged state statutes. The Supreme Court distinguished the narrow class of cases involving vagueness issues where the unsettled state law question concerns the application of the law to specific persons or to a specific course of conduct; in these cases, abstention may be appropriate.³⁸ By contrast, abstention is not appropriate where a complaint

³⁴Waldron v. McAtee, 556 F. Supp. 101, 105 (S.D. Ind.), *vacated*, 723 F.2d 1348 (7th Cir. 1983). The district court relied on dictionary definitions to define words in the ordinance like "loiter" and "prowl." Phrases like "disturb the repose of a person acting lawfully" and "breach of the peace" were defined according to cases in Indiana and elsewhere construing similar language. With respect to the structure of the ordinance as a whole, the district court concluded that its intent was to prevent disturbances of four general types: (1) rioting and crowd control problems; (2) fighting, (3) obstruction of traffic, and (4) threats to personal safety. Under this construction, the court found the ordinance not unconstitutionally vague because its language sufficiently identified "the general area of conduct" to be regulated and could not easily be drafted with greater precision while still maintaining comprehensiveness in regulating the broad scope of conduct to be prohibited. *Id.* at 104-05.

³⁵723 F.2d at 1352

³⁶*Id.* at 1351. See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) where the Court first invoked the modern doctrine of abstention).

³⁷377 U.S. 360 (1964).

³⁸*Id.* at 377.

is based on allegations that plaintiffs “cannot define the range of activities in which they might engage in the future, and do not want to forswear doing all that is literally or arguably within the purview of the vague terms.”³⁹ Under *Baggett* these broader challenges to a statute on its face are not appropriate for abstention.⁴⁰

The majority in *Waldron* narrowly construed the allegations in Waldron’s complaint to fit within the appropriate scope of abstention defined in *Baggett*. The court thus emphasized the “as applied” portion of the plaintiff’s complaint, and determined that the state courts should first determine whether or not the Indianapolis ordinance covered his conduct. The facial challenge to the vagueness of the ordinance was thus deferred until the “as applied” challenge could be pursued in state court, unless the plaintiff chose to present both challenges in state court. Moreover, as the court noted, if the state court definitively construed the statute not to cover Waldron’s conduct, then he would have no standing to challenge the ordinance on its face, and the federal court could avoid even a deferred ruling on the ordinance’s constitutionality.⁴¹

In spite of its attempt to bring its decision within the *Baggett* framework, the Seventh Circuit’s decision to abstain in this case clearly extends the boundaries of the abstention doctrine with respect to constitutional claims that statutes are void for vagueness. Although the court emphasized the specific factual allegations of the complaint, the complaint was predominantly a facial challenge to the ordinance. The plaintiff’s allegations as to the enforcement of the ordinance against his conduct were all directed at establishing his standing to challenge the ordinance, not at defining the scope of his challenge. Under any fair reading of his complaint, the plaintiff’s constitutional concern was not whether the ordinance prohibits him from meeting with friends at the public library. The plaintiff’s core allegation was that the ordinance did not make clear which activities it allows and which it bars. Even more importantly, the ordinance was challenged because it arguably does not provide sufficient guidelines to prevent its discretionary application to legitimate, even constitutionally protected, conduct.⁴²

³⁹*Id.* at 378.

⁴⁰The *Baggett* analysis was reaffirmed in *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289 (1979). The Court in *Babbitt* ordered abstention in a federal suit challenging, on grounds of vagueness, provisions in a state agricultural labor law providing criminal penalties for violations of the prohibitions and provisions restricting consumer publicity with respect to labor disputes. The Court concluded that state court construction of each of these provisions was possible in a single adjudication, and suggested simple narrowing constructions for each provision to avoid constitutional problems. The Court noted that the case was one which involved a straightforward choice between one or two alternatives in construing the statute with respect to the plaintiffs involved and thus fell within the area appropriate for abstention under *Baggett*. 442 U.S. at 308-10.

⁴¹723 F.2d at 1353.

⁴²In the court’s view, the Indianapolis ordinance is vague but not “that vague,” or at least not so vague as to be incapable of salvation by authoritative judicial construction.

The court recognized that abstention is generally not appropriate where a state law is challenged on its face, but based its decision to abstain here on the fact that the Indianapolis ordinance was also challenged as applied.⁴³ Yet, the result is that the court *has* abstained on both issues since the facial challenge will not be heard until the "as applied" challenge has been fully litigated. The effect of this decision is to leave the ordinance in effect without judicial approval, even though it is alleged to deter individuals in their right to come and go in downtown Indianapolis without risk of arrest under the ordinance as written or as enforced. For these and other reasons, Judge Swygert vigorously dissented from the decision of the panel majority. In his view, there was no real likelihood that the various possible interpretations of the Indianapolis ordinance could be resolved in the context of a single abstract state court declaratory judgment action.⁴⁴ In addition, he specifically disapproved of the use of abstention in cases where, as here, first amendment rights may be at stake.⁴⁵ Using abstention in a case involving constitutional claims is the equivalent to a requirement of exhaustion of state remedies,⁴⁶ a requirement for constitutional litigation rejected by the Supreme Court.⁴⁷

The *Waldron v. McAtee* case did not decide a question of substantive constitutional law. However, its invocation of the abstention doctrine to preclude federal review of a facial vagueness challenge to a state law implicating first amendment concerns may have a far-reaching effect on the ability of individuals to vindicate constitutional rights in federal court. A broadened abstention policy, coupled with wide restrictions on federal interference in state criminal matters,⁴⁸ and stricter standing requirements, can effectively narrow the scope of federal constitutional rights by creating barriers to their enforcement in federal court.

B. Due Process

1. *Notice and Unconstitutional Takings.*—a. *Zoning ordinances as unlawful takings.*—Although previous Indiana decisions had approved

Id. at 1352-53. The court, however, does not suggest the limiting construction that can be expected to cure the variety of imprecisions in the ordinance. Compare *Waldron*, 723 F.2d 1348 with *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979); see *supra* note 40.

⁴³723 F.2d at 1355.

⁴⁴*Id.* (Swygert, J., dissenting).

⁴⁵Judge Swygert thus concluded:

Moreover, abstention is particularly inappropriate where the impact of the statute on first amendment rights is uncertain. Then not only is further constitutional adjudication unlikely to be avoided, but constitutionally protected conduct may be deterred while the courts are resolving the issues in a piecemeal fashion.

723 F.2d at 1357 (Swygert, J., dissenting) (citation omitted).

⁴⁶*Id.* at 1356.

⁴⁷See *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Steffel v. Thompson*, 415 U.S. 452 (1979); .

⁴⁸See *Younger v. Harris*, 401 U.S. 37 (1971).

a wide range of zoning regulations, the Indiana Supreme Court in *Ailes v. Decatur County Area Planning Commission*⁴⁹ declared two local ordinances unconstitutional because they required discontinuance of existing legal nonconforming property uses within a fixed amortization period. The court held that a zoning ordinance which seeks to eliminate existing land uses in this way exceeds the state's police power and constitutes an unlawful taking without compensation in violation of due process.⁵⁰

Plaintiffs in the consolidated appeals had each operated junkyards at their residences for many years. Under zoning ordinances adopted by local planning commissions, their property was rezoned as residential, and they were required to eliminate their junkyards, together with any other nonconforming uses, within a three or five year amortization period after adoption of the zoning ordinance.⁵¹ When the plaintiffs failed to eliminate the offending use within the fixed amortization period, the local planning commissions obtained injunctions against their violations of the zoning ordinances. The plaintiffs sought relief from the injunctions, claiming that the zoning ordinances were unconstitutional. The trial courts and the Indiana Court of Appeals concluded that the zoning ordinances represented a reasonable accommodation between public and private interests and found them constitutional in all respects.⁵²

The Indiana Supreme Court disagreed. Acknowledging the issue to be one of first impression in Indiana, the court declined to follow the view of the majority of other jurisdictions which allows the constitutionality of a particular ordinance to be determined by the standard of reasonableness, on a case-by-case basis, balancing factors relating to the respective public and private interests in each case.⁵³ The supreme court found this analysis of factors to be completely irrelevant to determining the simple question whether the zoning regulation was an unlawful taking of private property:

⁴⁹448 N.E.2d 1057 (Ind. 1983).

⁵⁰*Id.* at 1060. The due process clause of the fourteenth amendment has been construed to require states to provide just compensation for the taking of private property. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁵¹The two ordinances involved contained similar language. The Ripley County ordinance required discontinuation of prior lawful uses within five years while the Decatur County ordinance required discontinuation within three years of the enactment of the zoning ordinance. *RIPLEY COUNTY, IND., ZONING ORDINANCES* § 3.5; *DECATUR COUNTY ORDINANCES* § 3.23 (1975); *quoted in Ailes*, 448 N.E.2d at 1058-59.

⁵²437 N.E.2d 1375 (Ind. Ct. App. 1982), *rev'd*, 448 N.E.2d 1057 (Ind. 1983).

⁵³*See* Annot., 22 A.L.R. 3d 1134 (1968 & Supp. 1981)

The court of appeals identified several relevant factors:

For example, the public benefit may be determined by considering the offensiveness of the nonconforming use in view of the surrounding neighborhood; the private loss may be measured by the value of the nonconforming use, the damages incurred by compliance including the hardship imposed on the user, and the length of time allowed for amortization.

437 N.E.2d at 1380.

From a constitutional standpoint, it does not appear that a resolution of any of these factors can make that reasonable which is basically and from the outset unreasonable. We must bear in mind that we are dealing with a use of a person's private property that was continuing and lawful at the time of the passage of the ordinance. It became unlawful only by reason of the provisions of the ordinance.⁵⁴

The court distinguished the long line of cases in Indiana which had approved various forms of zoning regulations.⁵⁵ Those cases involved ordinances that prohibited expansion of preexisting nonconforming uses and reinstatement of nonconforming uses after being once abandoned. While these ordinances are permissible, it is not permissible, under the court's view, to require elimination of existing nonconforming uses, even if a period of time is provided for amortizing the lost use: "We hold, however, that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power."⁵⁶ Only Justice Hunter dissented from the court's decision; he urged adoption of the view in the majority of other jurisdictions and followed by the court of appeals, as the approach which strikes the proper balance between public and private rights.⁵⁷

The Indiana Supreme Court's decision in *Ailes* represents a significant restriction on modern zoning regulations. It also evidences a general disinclination to permit traditional concepts of private property to be outweighed by more contemporary concepts of public interest. The court suggested that the remedy for truly obnoxious property uses is a common law nuisance action, which in the court's view may be a more legitimate means of serving the public interest than enactment of broad zoning ordinances.⁵⁸

. *b. Notice of tax sale.*—The United States Supreme Court considered the constitutionality of Indiana tax sales statutes in *Mennonite Board of Missions v. Adams*.⁵⁹ The statutory scheme at issue provided for the

⁵⁴448 N.E.2d at 1060.

⁵⁵See *Metropolitan Development Comm'n of Marion County v. Marianos*, 408 N.E.2d 1267 (Ind. 1980); *Misner v. Presdorf*, 421 N.E.2d 684 (Ind. Ct. App. 1981). *Dandy Co. v. Civil City of South Bend*, 401 N.E.2d 1380 (Ind. Ct. App. 1980); *Jacobs v. Mishawaka Board of Zoning Appeals*, 395 N.E.2d 834 (Ind. Ct. App. 1979).

⁵⁶448 N.E.2d at 1060.

⁵⁷*Id.* at 1061-62 (Hunter, J., dissenting).

⁵⁸*Id.* at 1060.

⁵⁹103 S. Ct. 2706 (1983). For a further discussion of this case, see Harvey, *Civil Procedure and Jurisdiction, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 91, 96 (1985).

county to hold annual tax sales for property on which taxes had been delinquent for fifteen months or more.⁶⁰ The statutes required the county to provide notice by certified mail to the landowners, and to post and publish notice to the public for a three week period prior to the sale.⁶¹ A person or institution holding a mortgage on the property was not given any personal notice under the statutes. After the tax sale, interested parties had two years to redeem the property.⁶² If the property was not redeemed within the redemption period, a deed which was not subject to prior liens on the property would be issued to the tax sale purchaser.⁶³ Notice of the imminent expiration of the redemption period was provided to the property owners, but no notice was provided to the mortgagee.⁶⁴ Once the deed was issued, the tax sale purchaser had clear and unencumbered title to the property, and the prior interest of a mortgagee was terminated.

The notice provisions of these statutes were challenged by the Mennonite Board of Missions which held a mortgage to secure a loan on property in Elkhart, Indiana. The property was sold at a tax sale to the purchaser Adams who, after expiration of the redemption period, obtained an unencumbered deed to the property, which he then asserted in a quiet title action against the former owner and the Mennonite Board of Missions. The Mennonite Board had not been notified of the tax sale until after expiration of the redemption period. Until this time, the owner had made the regular payments on the mortgage held by the Mennonite Board. The Board had no reason to know, and did not know, that taxes had not been paid.

In its defense to the quiet title action, the Mennonite Board asserted that the failure to provide it with actual notice of the tax sale or the expiration of the redemption period violated due process by failing to provide notice adequate to protect the Board's legal interest in the property.⁶⁵ The Indiana Court of Appeals rather summarily rejected this argument, relying on the decision of another district on the same issue.⁶⁶

The case was appealed to the United States Supreme Court, which reversed the Indiana court and declared the Indiana statute unconstitutional. Relying on a line of cases which invalidated under the due process clause various forms of constructive notice, the Court rejected

⁶⁰IND. CODE § 6-1.1-24-1, -12 (1982).

⁶¹*Id.* § 6-1.1-24-3, -4.

⁶²*Id.* § 6-1.1-25-1.

⁶³*Id.* §§ 6-1.1-25-14, -4(d).

⁶⁴*Id.* § 6-1.1-25-6.

⁶⁵The Board also asserted that the notice procedure violated equal protection. The Indiana Court of Appeals rejected the equal protection argument and the United States Supreme Court considered only the due process challenge.

⁶⁶427 N.E.2d 686, 688 (Ind. Ct. App. 1981), *rev'd*, 103 S. Ct. 2706 (1983).

any remaining differences with respect to notice requirements based on the traditional distinctions between in rem and in personam proceedings.⁶⁷ The Court held that the Indiana statute violated the due process clause because it failed to require notice personally or by mail to all those with interests in the property whose identity and address were "reasonably ascertainable."⁶⁸

The Court's holding was not limited to the particular context in which the case arose, the Court broadly held: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."⁶⁹ Three members of the Court vigorously dissented, arguing that the Court's adoption of a per se rule in favor of actual notice unwisely abandoned the previous practice of balancing in each case individual and state interests to determine the strictness of the constitutional requirements and foreclosed the states from adopting constructive notice provisions which might better serve the competing interests involved.⁷⁰

The rule adopted by the Supreme Court in *Mennonite Board of Missions* crystallizes a trend favoring actual service. Contrary to the concerns expressed by the dissenting justices, the rule announced by the Court can always be modified if, in particular circumstances, the state can show a strong reason for avoiding actual notice. In the meantime, the decision provides the kind of guidance to state legislatures which only a bright line rule can achieve.

With respect to Indiana law, the Court declined to decide two issues as to the validity of the current tax sale statutes in Indiana. It did not rule on the constitutionality of providing notice to the former owner, but not to a mortgagee, of the expiration of the redemption period. In view of the significant legal interest involved, there is no apparent basis to distinguish between the mortgagee's right to actual notice of the tax sale and a correlative right to notice of the expiration of the redemption period.

⁶⁷103 S. Ct. at 2710-11 & n.3. See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (holding that a state must provide notice by mail to all interested parties whose identity can be easily ascertained prior to initiating an accounting to settle a common trust fund). The Court in *Mullane* expressly found constructive notice by publication inadequate in that to protect the due process rights of those with a property interest in the trust.

⁶⁸103 S. Ct. at 2712. The Court did not limit its holding to the facts of the case; it called the requirement of notice by means likely "to ensure actual notice . . . a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party" *Id.*

⁶⁹*Id.*

⁷⁰103 S. Ct. at 2715-16 (O'Connor, J., dissenting).

The Supreme Court also declined to rule on the constitutionality of the statute as amended by the Indiana legislature in 1980. The amendment permits a mortgagee to obtain actual notice of tax sales by filing a form with the county auditor and paying a small service fee.⁷¹ The enactment of this procedure, however, may not avoid the duty under the *Mennonite Board* decision to notify mortgagees who do not comply. The Supreme Court, in adopting a per se rule of actual notice, was not persuaded by arguments that a party that could easily protect its own interests was not entitled to automatically receive the benefit of actual notice at the state's expense.⁷²

2. *Abortion Regulation.*—In 1982 the Indiana legislature enacted a provision requiring parental notification prior to performing an abortion on an unemancipated minor.⁷³ The statute was promptly challenged in a class action suit on behalf of a class of pregnant or potentially pregnant resident and out-of-state minors. The main focus of the litigation was the portion of the statute which permitted minors, upon application to the juvenile court, to obtain a waiver of the notification requirement.⁷⁴ The plaintiffs alleged that the statutory procedures were inadequate to protect the substantive rights of mature minors to obtain an abortion in a prompt, unburdened, and confidential manner. After a trial on the plaintiffs' claims, the district court found the statute constitutional in all respects. On appeal, the Seventh Circuit in *Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*⁷⁵ disagreed, holding that several aspects of the statute impermissibly infringed on the constitutional rights of a mature minor to obtain an abortion. Unable to sever the unconstitutional from the constitutional portions of the statute, the court struck down the notification requirement in its entirety and enjoined its further enforcement.

⁷¹Act of Feb. 28, 1980, Pub. L. No. 45-1980, Sec. 1, 1980 Ind. Acts 534 (codified at IND. CODE § 6-1.1-24-4.2 (1982)).

⁷²By contrast, Justice O'Connor, in dissent, stated that "[w]hen a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care." 103 S. Ct. at 2717 (O'Connor, J., dissenting).

⁷³Act of Feb. 25, 1982, Pub. L. No. 203-1982, 1982 Ind. Acts 1516 (codified at IND. CODE § 35-1-58.5-2.5 (1982) (amended 1984)). The statutory language analyzed by the court is set out in full in an appendix to *Indiana Planned Parenthood Affiliates Assoc., Inc. v. Pearson*, 716 F.2d 1127, 1144 (7th Cir. 1983). Following the Seventh Circuit's decision, the statute was amended to conform to the constitutional requirements set down by the court. Act of March 5, 1984, Pub. L. N. 106-1984, Sec. 5, 1984 Ind. Acts 1045, 1052-53 (codified at IND. CODE § 35-1-58.5-2.5 (Supp. 1984)).

⁷⁴The statute provided that a "minor who objects" to providing notification to her parents or guardian under the statute, or the minor's physician, may request the juvenile court to waive the notice requirement. The court must respond to this petition within 48 hours, and must waive the notice requirement if it determines "that the minor is mature enough to make the abortion decision independently or that notification would not be in the minor's best interests." IND. CODE § 35-1-58.5-2.5(d) (1982) (amended 1984).

⁷⁵716 F.2d 1127 (7th Cir. 1983).

The court's review of the Indiana notification statute was guided by the recent Supreme Court decisions of *Akron v. Akron Center for Reproductive Health, Inc.*,⁷⁶ and *Planned Parenthood Association v. Ashcroft*.⁷⁷ The Court in *Akron* recognized a constitutional right to an abortion without parental notification or consent for "an immature minor whose best interests are contrary to parental involvement."⁷⁸ To protect this constitutional right, a statute requiring parental consent or notification must provide an adequate bypass procedure to permit the minor to establish her maturity or her overriding interest in obtaining an abortion without parental involvement.⁷⁹

The Seventh Circuit, in reviewing the Indiana statute under this standard, approved the concept of a parental notification requirement,⁸⁰ as well as the portion of the statute granting the juvenile court jurisdiction to consider minors' petitions to waive the notice requirement, and the statute's substantive standard for determining when a waiver of notification should be granted. The court, however, found the procedures for obtaining waiver to be unconstitutional in several respects. The court found unconstitutional the Indiana statute's failure to provide either for expedited appellate review of an adverse decision on the minor's petition for waiver of parental notification or for the appointment of counsel for indigent minors seeking waiver of parental notification.⁸¹ The court, piecing together the various plurality and concurring opinions in *Akron*, *Ashcroft*, and other Supreme Court cases, concluded that express procedures for an expedited appeal must be included in a constitutionally drafted parental notification statute.⁸² While no Supreme Court decision

⁷⁶103 S. Ct. 2481 (1983).

⁷⁷103 S. Ct. 2517 (1983).

⁷⁸103 S. Ct. at 2491 n.10 (citation omitted).

⁷⁹In *Akron*, the Supreme Court found the bypass procedures in a local ordinance inadequate under these standards. The Akron ordinance was defective because it made a blanket determination that all minors under the age of 15 are too immature to make an abortion decision or that an abortion is never in the minor's best interests without parental approval. *Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481. By contrast, in the companion decision in *Ashcroft*, a Missouri minor consent statute was found to provide adequate procedures. The Missouri statute did not permit a juvenile court to deny a petition for an abortion unless it first found the minor was not mature enough to make her own decision. *Planned Parenthood Ass'n. v. Ashcroft*, 103 S. Ct. 2517.

⁸⁰716 F.2d at 1133 (citing *Akron*, 103 S. Ct. at 2497). Because the parental notification statute regulates abortions for minors, it need not meet the compelling state interest test applicable to regulation of adult abortions. 716 F.2d at 1133 (citing *Charles v. Carey*, 627 F.2d 772, 776-78 (7th Cir. 1980)).

⁸¹716 F.2d at 1134-36.

⁸²*Id.* at 1137-39. The court rejected the state's argument that Indiana courts already have authority to expedite appeals on their own initiative, since such a procedure was both uncertain and discretionary under Indiana law. By contrast, the Missouri statute approved in *Ashcroft* expressly required the Missouri Supreme Court to adopt a procedure for expedited consideration of appeals under the statute. 716 F.2d at 1134-36. This defect in the Indiana statute was cured in the 1984 amendment, which provides for "an expedited

compelled the conclusion that the state must provide counsel, the court of appeals relied on the importance generally attached in the Supreme Court's decisions to an adequate procedure for obtaining waiver, and on the practical difficulties necessarily present for minors in obtaining competent legal representation in these circumstances.⁸³ The court determined that the Indiana statute impinged on minor's interests in confidentially by expressly subjecting the records of proceedings on petitions for waiver of parental notification to the disclosure laws applicable generally to juvenile court proceedings.⁸⁴ The statute also violated the minor's confidentiality by requiring the juvenile court to notify the minor's parents once the petition for waiver is denied, a procedure which improperly forecloses a minor's ability to approach her parents in her own way once her request for waiver has been denied and which may impermissibly deter minors from pursuing the waiver procedures.⁸⁵

Finally, the court concluded that the requirement that a minor wait twenty-four hours after actual notice to her parents before having an abortion is an impermissible burden on the minor's right to an abortion which is not outweighed by any legitimate state interest. In disapproving the twenty-four hour waiting period, the court relied on authority finding waiting periods unconstitutional for adults, concluding that the reasoning in those cases applies equally to minors.⁸⁶ The court, however, approved the provision requiring a forty-eight hour wait in the case of constructive notice since this period is necessary to assure that prior notice is effected in cases in which actual notice is not possible.⁸⁷

The Seventh Circuit's carefully written decision in *Indiana Planned Parenthood* should provide guidance both to other courts and to legislatures in construing the various recent pronouncements of the Supreme

appeal, under rules to be adopted by the Indiana Supreme Court." IND. CODE § 35-1-58.5-2.5(f) (Supp. 1984). On August 30, 1984 the Indiana Supreme Court adopted new Appellate Rule 16, which provides for a direct appeal to the Indiana Supreme Court within 10 days of an adverse waiver decision and the immediate consideration of the appeal without briefs or oral argument. See IND. R. APP. P. 16.

⁸³The court also relied on its own earlier decision in *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978), which stated:

It appears that Legal Services Corporation attorneys will be unable to handle actions under the Act. See 42 U.S.C. § 2996f(b)(8) (prohibiting the use of Legal Services Corporation funds where an individual seeks to procure a non-therapeutic abortion). Thus, a minor is required to navigate at least the initial stages of a judicial procedure either on her own or with private counsel. Yet, it is obvious that private counsel will be beyond the resources of most teenagers.

582 F.2d at 1389 n.28 (7th Cir. 1978).

⁸⁴716 F.2d at 1139 n.12. The court agreed with the state, however, that allowing access to the waiver proceeding to persons "providing services" did not allow access to parents. *Id.* at 1139.

⁸⁵*Id.* at 1141.

⁸⁶*Id.* at 1142-43. See *Akron*, 103 S. Ct. at 2503; *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1014 (1st Cir. 1981).

⁸⁷716 F.2d at 1143.

Court on the issue of parental consent and notification as a requirement for a minor's abortion. Its holding that indigent minors have an absolute right to appointment of counsel in waiver hearings, in particular, goes beyond the express requirements of Supreme Court precedent, and provides substantive as well as procedural protection for minors whose ability to choose an abortion is being increasingly constricted by legislation requiring parental consent or notification.

C. Equal Protection

The Indiana Court of Appeals held in *Portman v. Steveco, Inc.*⁸⁸ that a provision of the Indiana Workmen's Compensation Act which created a presumption of dependency in favor of widows but not widowers was a form of gender-based discrimination in violation of the equal protection clauses of the Indiana and United States Constitutions.⁸⁹ Under the Indiana Act, the surviving spouse's entitlement to the statutory death benefit requires a finding of dependency for support on the deceased worker. The statute, however, created a conclusive presumption that a wife living with her husband is dependent. The same presumption was accorded a husband only if he established that he was "both physically and financially incapable of self-support."⁹⁰

Under the decision of the United States Supreme Court in *Wengler v. Druggists Mutual Insurance Co.*,⁹¹ such a provision violates the equal protection clause. It discriminates both against the surviving husband, who is denied the presumption available to widows, and against the working woman who is entitled to the same protection for her spouse, in the event of her death that a male worker receives. Based on this controlling authority, the Indiana Court of Appeals found the Indiana provision unconstitutional.⁹²

The more difficult question for the court was the manner in which it should order the gender-based discrimination to be eliminated. The Supreme Court in *Wengler* left the question of remedy to the state, and those states considering the question have split on the appropriate remedy. The majority have ordered the state to extend the presumption of dependency to widowers, so that neither widows nor widowers would be required to make a special showing.⁹³ However, other courts have

⁸⁸453 N.E.2d 284 (Ind. Ct. App. 1983). For a further discussion of a related case, see Coriden, *Workers' Compensation, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 469, 469 (1985) (earlier decision, discussed under the name *Clem v. Steveco, Inc.*).

⁸⁹IND. CONST. art. I, § 23; U.S. CONST. amend. XIV. The Indiana equal protection clause has been held to be coterminous, in certain contexts, with the parallel provision of the federal Constitution. *Sidle v. Majors*, 264 Ind. 206, 341 N.E.2d 763 (1976).

⁹⁰IND. CODE § 22-3-3-19(b) (1982).

⁹¹446 U.S. 142 (1980).

⁹²453 N.E.2d at 287.

⁹³See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 601 S.W.2d 8 (Mo. 1980); Oknefski

eliminated the presumption of dependency and required both men and women to affirmatively prove dependency as a condition to receipt of statutory death benefits.⁹⁴ The Indiana court adopted the majority view, ordering the state to extend its presumption to widowers as well as widows. In the court's view, this remedy was in accord with the generally "beneficent" purposes of social legislation of this kind, and more closely served the apparent legislative purpose of granting a favorable presumption to at least some classes of surviving spouses.⁹⁵ The remedy adopted by the court is in accord with the majority of other jurisdictions, and also with the general policy disfavoring the essentially punitive response to claims of differential treatment which adopts a less rather than a more favorable practice to a remedy inequality.⁹⁶

D. Eighth Amendment

The Seventh Circuit considered a sweeping challenge to conditions at the Indiana State Prison in Michigan City in *Wellman v. Faulkner*.⁹⁷ The plaintiffs alleged that the totality of conditions at the Michigan City prison constituted cruel and unusual punishment in violation of the eighth amendment. The district court rejected the totality of the circumstances challenge, but found constitutional violations in the general overcrowding at the prison and in specific instances of medical mistreatment. On appeal the Seventh Circuit agreed with these findings, holding in addition that the systematic failure to provide adequate medical care also violated constitutional guarantees.⁹⁸

With respect to the level of medical care, the court concluded that the plaintiffs' satisfied standards for proving an eighth amendment violation with evidence of a "deliberate indifference" to serious medical needs of prisoners."⁹⁹ Lack of medical care rises to the level of "deliberate indifference" when there is either evidence of a pattern of negligent acts by the medical staff, or evidence of gross institutional deficiencies in staff, facilities, equipment, or procedures.¹⁰⁰ The court found evidence in the record of repeated instances of medical mistreatment, including

v. Workmen's Comp. Appeal Bd., 63 Pa. Commw. 450, 439 A.2d 846 (1981) *Davis v. Aetna Life & Casualty Co.*, 603 S.W.2d 718 (Tenn. 1980).

⁹⁴453 N.E.2d at 287. *See, e.g.,* *Arp v. Workers' Compensation Appeals Bd.*, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977); *Day v. W.A. Foote Mem. Hosp., Inc.*, 412 Mich. 698, 316 N.W.2d 712 (1982).

⁹⁵453 N.E.2d at 287.

⁹⁶For example, the Equal Pay Act prohibits employers from lowering a man's pay in response to a woman's claim for equal pay. 29 U.S.C. § 206(d)(1) (1982).

⁹⁷715 F.2d 269 (7th Cir. 1983).

⁹⁸*Id.* at 271.

⁹⁹*Id.* at 272 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

¹⁰⁰715 F.2d at 272 (citing *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)).

the prison's denial of treatment for known ailments for up to five years and its failure to treat an inmate visibly suffering from cardiovascular shock for a period of nine hours. The court also noted a pattern of staffing deficiencies in the failure to fill the position of staff psychiatrist for more than two years, and the staffing of two of the three full-time medical doctor positions with physicians from abroad who neither spoke nor understood much of the English language. The record also evidenced recurring problems with stocking necessary medical supplies.

The district court had attributed the deficiencies in medical care at the Michigan City prison to an inadequate salary structure authorized by the Indiana legislature and thus declined to find an eighth amendment violation. The court of appeals, however, concluded that inadequate funding reinforced its conclusion that the deficiencies were systematic and not likely to be remedied.¹⁰¹

Although it affirmed the district court's findings of substantive violations, the court of appeals remanded the case to the district court for reconsideration of the award of damages to individual defendants who had been unconstitutionally denied medical treatment. The district court had assessed damages personally against the individual defendants who were senior officials in the prison administration.¹⁰² The court reaffirmed that an individual defendant is responsible for a constitutional deprivation only if the plaintiffs establish the defendant's personal responsibility for the deprivation.¹⁰³ In previous decisions, the court had afforded plaintiffs a presumption during the pleading stages that senior officials are responsible for claimed deprivations.¹⁰⁴ However, the court in this case emphasized that this presumption does not survive beyond the pleading stage to trial and post-trial review. After discovery is completed, the plaintiffs again have the burden to establish the personal responsibility of an individual defendant for the specific acts complained of as a prerequisite to the recovery of damages. Accordingly, the case was remanded to the district court for clarification of the plaintiffs' right to damages in view of the plaintiffs' burden at trial to prove the personal responsibility of the individual defendants.

¹⁰¹715 F.2d at 273.

¹⁰²Named defendants were the warden, the commissioner, and the director of classification and treatment. No damages were sought or awarded against the state or its agency which are immune under the eleventh amendment. See *Edleman v. Jordan* 415 U.S. 651 (1974).

¹⁰³715 F.2d at 275. The Seventh Circuit has held that the personal responsibility requirement for an unconstitutional deprivation is established "if [the official] acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir. 1982) (citations omitted), cited in *Wellman*, 715 F.2d at 275.

¹⁰⁴*Duncan v. Duckworth*, 644 F.2d 653 (7th Cir. 1981).

E. Constitutional Rights of Public Employees

1. *First Amendment and Public Employees.*—The Seventh Circuit, in an en banc decision in *Egger v. Phillips*,¹⁰⁵ upheld the transfer of an employee whose exercise of concededly protected first amendment rights had made him a disruptive presence in the office, holding that although a public employee has a right to free speech in the workplace, he may have to bear the employment-related costs of exercising that right.

Egger was an FBI agent assigned to the Indianapolis office. Based on information discovered in an investigation of organized gambling, he accused a fellow agent of wrongdoing. The accusation received wide circulation within the office, in the local law enforcement community, and, eventually, in the press. As a result of these accusations and cross-accusations and the distrust and resentment among agents which ensued, the Indianapolis FBI office allegedly suffered a loss of efficiency and morale. Egger was transferred, at the instigation of Indianapolis office head Phillips, to the Chicago FBI office. When he refused to report for duty in Chicago, he was dismissed.

In an action for damages brought by Egger, the district court granted summary judgment in favor of the defendant Phillips:

“Egger’s activities substantially contributed to creating havoc in the Indianapolis Field Office of his employer. . . .

Even assuming that Phillips’ efforts to have Egger transferred were in part motivated by Egger’s attempts to uncover what he considered to be wrongdoing by other agents, the substantial legitimate basis for Egger’s transfer supplants any element of causation between the assumed wrong motive and the transfer.”¹⁰⁶

A panel of the Seventh Circuit initially reversed the district court,¹⁰⁷ finding that Egger’s conduct implicated significant first amendment values and concluding that summary judgment was not a proper vehicle for determining whether Phillips’ actions were motivated by legitimate employer concerns or were simply retaliation for Egger’s protected conduct.¹⁰⁸ On rehearing, however, the court sitting en banc rejected the panel’s reasoning and affirmed the district court’s grant of summary judgment.

The en banc court affirmed the district court’s decision on two grounds.¹⁰⁹ It found first that Phillips was entitled to summary judgment

¹⁰⁵710 F.2d 292 (7th Cir. 1983).

¹⁰⁶710 F.2d at 295. (quoting *Egger v. Phillips*, No. 78-508-C, slip op. at 48 (S.D. Ind. Sept. 22, 1980)).

¹⁰⁷*Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1982), *vacated*, 710 F.2d at 294 n.1 (7th Cir. 1983).

¹⁰⁸669 F.2d at 503.

¹⁰⁹In reaching its decision, the court plurality considered and rejected other claims

on his defense of qualified immunity. The court relied on the Supreme Court's decision in *Harlow v. Fitzgerald*,¹¹⁰ which was decided after the original panel decision. Under *Harlow*, a public official is immune from suit for damages unless his conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."¹¹¹ Under the objective test of *Harlow*, the question of qualified immunity can be decided on summary judgment since it does not require inquiry into a defendant's subjective intent. The Seventh Circuit concluded that Phillips was entitled to summary judgment under the objective test for qualified immunity because the legal standards governing the constitutionality of his conduct were uncertain at the time he obtained Egger's transfer:¹¹² "We believe that one in Phillips' position would reasonably view the relation between Egger and others in the office as strained and, notwithstanding the root cause of the strained relations, it would appear to a reasonable person that a transfer recommendation would be lawful."¹¹³ Because Egger's action was solely for damages against Phillips, the finding that Phillips was entitled to immunity as a matter of law justified by itself the summary judgment in his favor.

The court, nevertheless, also considered the first amendment issue and decided it against Egger.¹¹⁴ In evaluating Egger's first amendment claims, the court followed the balancing test governing public employee free speech rights as set out by the Supreme Court in *Pickering v. Board of Education*.¹¹⁵ The *Pickering* standards recognize the special interest

asserted by the defendant in support of the grant of summary judgment. The court ruled that Congress' decision not to include FBI agents within the administrative appeal system available to other federal employees did not evidence an intent to preclude a right of action for direct constitutional deprivations under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). 710 F.2d at 297-300. See also *Bush v. Lucas*, 103 S. Ct. 2404 (1983). The plurality also rejected claims that FBI agents were subject to heightened constraints on their exercise of first amendment rights because the FBI is a "paramilitary organization." 710 F.2d at 311-12. Judge Cudahy concurred in these sections only, and in the result. Four judges entered separate concurrences declining to join in these two portions of the court's decision.

¹¹⁰457 U.S. 800 (1982).

¹¹¹*Id.* at 818 (citations omitted).

¹¹²Specifically, the court concluded that there was legal authority at the time for the conclusion that (1) an employee's on-the-job expressions were unprotected; (2) Egger's speech did not touch sufficiently on matters of public concern to be entitled to first amendment protection; and (3) the disruptive impact of employee speech justifies adverse action, including discharge. 710 F.2d at 315. Judge Cudahy, concurring separately in the result, reluctantly agreed that *Harlow* required this conclusion. He noted, however, that observance of the completely objective approach to qualified immunity impedes the development of the law in this area because defendants under the *Harlow* formulation are liable only in cases where the law was already clearly established at the time of their actions. 710 F.2d at 324 n.1.

¹¹³710 F.2d at 315 (citation omitted).

¹¹⁴*Id.* at 314 n.27.

¹¹⁵391 U.S. 563 (1968).

of the state as employer in regulating its employees' speech which does not exist in regulating the speech of the public at large. The court formulated the problem as a balance of interests: "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹¹⁶ The Seventh Circuit recognized that the rationale of *Pickering* protected public employees' private intra-office statements as well as public expressions, but that the balance between competing interests may be struck differently where only internal communications are at stake.¹¹⁷

The court struck the balance in this case through a detailed factual review of the evidence and an analysis of three factors: (1) the substance of the communications (2) the time, place, and manner of communication, and (3) the interests of the government as employer. The court concluded that the initial accusation by Egger that a fellow agent had engaged in serious wrongdoing was clearly a matter of public concern. The court also found, however, that much of the voluminous record of Egger's actions after the accusation involved speech which was related principally to "institutional," that is, work-related, concerns. The court concluded that even the initial accusation against his fellow agent was distinguishable from general public criticism.¹¹⁸ The accusation implicated internal matters in that it was directed against an individual rather than against the institution, and, therefore, necessarily involved a legitimate employment concern about relationships between coworkers. Also, the accusation was based on the result of a work-related investigation, which the agency as an employer had a right to evaluate for accuracy and judgment.¹¹⁹ The court also observed that much of the disruption in the Indianapolis office following Egger's accusation was due to his own behavior in disclosing his findings to a coworker who, predictably, revealed it to the accused agent. Moreover, Egger, in the court's view, went beyond the bounds of reasonable behavior by deluging his superiors for months with lengthy and repetitive written and oral communications.

Finally, in view of the nature and manner of Egger's speech-related conduct, the court concluded that Phillips was justified in transferring Egger out of the Indianapolis office. All of the governmental interests which dictate disciplinary action against an employee were found to be strongly supported by the evidence in this case, including the need for

¹¹⁶*Id.* at 568. In *Pickering*, the Court held that a school board could not terminate a teacher for writing a letter to the newspaper criticizing the manner in which the Board allocated its budget between academic activities and sports.

¹¹⁷710 F.2d at 314 n.26, 316. *See* Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

¹¹⁸710 F.2d at 317-18.

¹¹⁹*Id.* at 319.

harmony between coworkers, confidentiality, competent performance of daily duties, and a close and personal working relationship between an employee and his supervisors.¹²⁰ While these factors did not render Egger's communication unprotected, they tipped the balance, under the *Pickering* standards against unfettered protection of Egger from reasonable employment-related decisions.

The balance in favor of the employment action in this case was held to be sufficiently strong to justify a grant of summary judgment, without a separate inquiry into Phillips' subjective motivation. In the court's view, Egger was asking not only for protection for his right to speak but immunization from the natural consequences of it: "The First Amendment protects the right of a government employee to make good faith accusations of malfeasance in office against fellow workers, but the First Amendment does not guarantee the employee a cost-free exercise of that right."¹²¹ The court found the transfer of Egger out of the Indianapolis office was simply a natural consequence of the disruption and bad feeling caused by Egger's initial accusation. Where the transfer is fully justified by legitimate employment-related needs, the fact that Egger bears the natural and possibly inevitable cost of his speech does not violate the first amendment.¹²²

The Seventh Circuit's en banc decision in *Egger v. Phillips* was handed down soon after the Supreme Court's decision on the same issue in *Connick v. Myers*.¹²³ In *Connick* the Court ruled that a public employee could be discharged for circulating a questionnaire among coworkers which her superiors deemed to be potentially inflammatory and disruptive. The approach followed by the Supreme Court in *Connick*, while ostensibly preserving the balancing test in *Pickering*, appears to restrict the protection of first amendment rights to a greater degree than the *Egger* decision. *Connick* takes a very narrow view of the range of statements which touch on "public concerns" and which are thus entitled to protection against work-related sanctions. The Seventh Circuit in *Egger*, although agreeing that only statements on matters of public concern will generally merit protection, recognized a mixture of public, institutional,

¹²⁰Thus, the court concluded:

In this case, the *Pickering* balance is clear—the mutual distrust between Egger and many of his colleagues is undisputed, and the need for such trust is vitally important in the specific employment context in the case. Egger had lost his effectiveness in the Indianapolis office and the challenged action—the transfer—was tailored to vindicate the specific state interest at stake.

Id. at 323 (citations omitted).

¹²¹*Id.* at 322.

¹²²*Id.* at 323.

¹²³103 S. Ct. 1684 (1983). The Seventh Circuit noted that *Connick* was handed down after the *Egger* decision was authored and approved by the court, and that it supported the *Egger* result. 710 F.2d at 294 n.*.

and personal aspects in a single statement. Although the court seems inclined to hold these statements protected, such statements are easily outweighed by competing interests. In addition, *Connick* permits an employee to be discharged on the spot, based on, at most, a reasonable fear of disruption. In *Egger*, the court only approved the transfer of an employee upon evidence of real and substantial adverse consequences resulting from the employee's continued presence on the job.

While the Supreme Court's latest pronouncement is controlling where inconsistent with *Egger*, litigants in this circuit can, nevertheless, expect some adherence by the Seventh Circuit to the general approach so carefully worked out in *Egger* in cases arising on the same issue.

2. *Due Process and Public Employees*.—Numerous cases have been decided this past year in the federal and state courts concerning the procedural due process rights of public employees subjected to disciplinary action. In deciding these cases, a court is required first to determine whether or not an employee has a constitutionally recognized property or liberty interest at stake.¹²⁴ It next must decide whether or not the employee has been deprived of that right without due process. In this inquiry, the court must delve into the procedures followed by the public employer and their adequacy under due process standards. State and federal cases arising in Indiana have addressed all of these issues.

a. *Right to confront accusers*.—In *Green v. Board of School Commissioners*,¹²⁵ the Seventh Circuit held that procedures adopted by a school board were adequate to satisfy the due process rights of a school bus driver whose employment was terminated for making sexual advances to female school children riding his bus. Before his termination, the school board sent him notice of the charges against him and afforded him a hearing to contest the charges. At the hearing, however, the children who accused him of misconduct were not present and, as a result, Green was unable to challenge their credibility. Green claimed that for this reason he was deprived of his due process right to a fair hearing.

The court found the hearing adequate under the circumstances, despite the absence of the key witnesses. The school board supplied Green with unsigned copies of the children's handwritten statements, which had been provided in individual interviews with a police investigator retained by the school board. Further, these statements were signed by each child's parent, who reviewed it in the presence of the child and the investigator. In view of the school board's legitimate interest in protecting the children from exposure in an open hearing, the court concluded that the procedure met the requirements of due process.

¹²⁴*Board of Regents v. Roth*, 408 U.S. 564 (1972).

¹²⁵716 F.2d 1191 (7th Cir. 1983).

While the court decided the case on the question of the adequacy of the procedures afforded, it questioned whether or not any property or liberty interest was involved so as to trigger the due process requirements. Green claimed a property right based on his contract of employment with the school board. The court questioned whether or not an employment contract would in all cases be a property right justifying full procedural protection,¹²⁶ further, whether or not a liberty interest had been established. Although recognizing that an individual has a liberty interest in "associating with members of his community and in being employed,"¹²⁷ which can be infringed by "stigmatizing" publicity,¹²⁸ the court did not believe that these interests were implicated here because the school board did not make public its reasons for terminating Green's contract. The court, however, did not rule on these issues, which present more substantial legal questions, because it found the procedures afforded Green unquestionably adequate.

b. Deprivation of liberty or property in employment transfer.—In *Lawson v. Sheriff of Tippecanoe County*,¹²⁹ the plaintiff claimed a deprivation of liberty based on her discharge for publicly disclosed charges of dishonesty. The plaintiff was a radio dispatcher for the county sheriff's department. When her husband was arrested for alleged participation in an auto theft ring, Lawson was discharged from her job. The sheriff made statements to the press that she was discharged because she had access through her job to automobile registration information with which she might have tampered.

Lawson, as an "at-will" employee, had no property interest in her particular job.¹³⁰ However, the court recognized a possible infringement of her liberty interest in her ability to follow a chosen "trade, profession, or other calling."¹³¹ The court defined the constitutional significance of this interest:

[W]hen a state fires an employee for stated reasons likely to make him all but unemployable in the future, by marking him as one who lost his job because of dishonesty or other job-related moral turpitude, the consequences are so nearly those of

¹²⁶In *Vail v. Board of Education*, 706 F.2d 1435 (7th Cir. 1983), *aff'd*, 104 S. Ct. 2144 (1984), the court held that a teacher's contract with the school board created a property right through "legitimate expectations of continued employment" and that the teacher was therefore entitled to a pretermination hearing. *Id.* at 1440. The Supreme Court granted certiorari and affirmed the decision without opinion by an equally divided Court, with Justice Marshall not participating. 104 S. Ct. 2144 (1984).

¹²⁷716 F.2d at 1192 (citation omitted).

¹²⁸*See Board of Regents v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, (1971); *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976).

¹²⁹725 F.2d 1136 (7th Cir. 1984).

¹³⁰*Id.* at 1138.

¹³¹*Id.*

formally excluding him from his occupation that the law treats the state's action the same way, and insists that due process be provided.¹³²

The district court had granted summary judgment on the ground that no liberty interest was violated in this case because the plaintiff had not been fired, but, according to the sheriff's affidavit, was offered a different job with the department within a few days of her discharge as a radio dispatcher.¹³³

The Seventh Circuit agreed with the district court that the determinative inquiry in this case was whether or not Lawson had been fired. If fired, her discharge together with the public accusations of dishonesty gave rise to a protected liberty interest. If she was not fired, the public statements by themselves did not give rise to a liberty interest requiring due process protection.¹³⁴ The appeals court, however, disagreed with the district court's conclusion that the offer of another job necessarily meant that she had not been discharged. In the court's view, only the offer of a job commensurate with her previous work would preclude the loss of her liberty interest:

In our view an employer cannot avoid liability by offering the employee a job far beneath the one he had. To be demoted from a responsible and well-paid job to a menial and low-paying one is to be as effectively excluded from one's trade or calling as by being thrown out on the street.¹³⁵

Because the sole affidavit before the district court did not identify the nature of the job offered to Lawson, the court reversed the district court's grant of summary judgment and remanded the case for further factual inquiry.

c. Time for holding a hearing.—The districts of the Indiana Court of Appeals conflict as to whether or not a full disciplinary hearing must be held prior to a public employee's dismissal. In *Hunt v. Shettle*, the Indiana Court of Appeals for the Third District considered the adequacy of disciplinary procedures afforded a state police officer.¹³⁶ Sergeant Danny Hixenbaugh was charged with giving a false statement to a fellow officer. After notice of the charge, Hixenbaugh appeared before State Police Superintendent Shettle where he was questioned about the relevant events and given an opportunity to explain his conduct.¹³⁷ Shettle found

¹³²*Id.* at 1139.

¹³³537 F. Supp. 918, 922 (1982), *rev'd*, 725 F.2d 1136 (7th Cir. 1984).

¹³⁴The court observed that to hold otherwise would swallow up the common law concepts of defamation within the federal constitutional scheme. 725 F.2d at 1138.

¹³⁵*Id.* at 1139.

¹³⁶452 N.E.2d 1045 (Ind. Ct. App. 1983).

¹³⁷IND. CODE § 10-1-1-6 (1982) establishes the procedure for disciplinary actions against state police officers. This procedure gives the officer the right to answer the charges

Hixenbaugh guilty of the charges and ordered him demoted from sergeant to trooper. Hixenbaugh requested review of the Superintendent's decision by the State Police Board. The Board's review procedure includes a full evidentiary hearing with an opportunity to confront witnesses and a right to counsel. However, in Hixenbaugh's case, in spite of his timely request for review, the Board's hearing was not held until more than fourteen months after his demotion.¹³⁸

The court of appeals held that the fourteen month delay in affording the plaintiff a full evidentiary hearing on his demotion violated his constitutional right to procedural due process. The court recognized that a state statute providing for demotion of state police officers "for cause" created a property interest entitled to due process protection.¹³⁹ In the court's view, due process requires the state to conduct a full hearing in connection with the demotion.¹⁴⁰ However, the court stated that, while some form of hearing is ordinarily required prior to deprivation of a property interest, the full hearing need not in all circumstances precede the demotion.¹⁴¹

Hixenbaugh's "appearance" before Shettle prior to his demotion did not satisfy due process requirements. His subsequent hearing before the State Police Board was procedurally adequate, but because it was delayed for fourteen months after the demotion, it did not meet the constitutional standards for due process. As the court found, for a post deprivation hearing to be adequate it must be held within a reasonable time after the deprivation by summary proceedings. A fourteen month delay, in the court's view, was not reasonable.¹⁴²

against him at a personal appearance before the Superintendent held within five days after the charges have been delivered. The officer may have the determination reviewed through an evidentiary hearing before the State Police Board, at which hearing he may be represented by an attorney. The statute also provides for judicial review of the decision of the State Police Board.

¹³⁸452 N.E.2d at 1051.

¹³⁹*Id.* at 1050. *Accord* Natural Resources Comm'n v. Sullivan, 428 N.E.2d 92 (Ind. Ct. App. 1981). IND. CODE § 10-1-1-6 (1982) provides in relevant part: "The superintendent may discharge, *demote* or temporarily suspend any employee of the department, *for cause*, after preferring charges in writing." (emphasis added).

¹⁴⁰The court stated: "A hearing is a proceeding of relative formality held in order to determine issues of fact or law in which evidence is presented and witnesses are heard. The party responding to the charges made by the agency must be given an opportunity to rebut evidence and cross-examine witnesses." 452 N.E.2d at 1050. (citation omitted).

¹⁴¹The court relied on *Parratt v. Taylor*, 451 U.S. 527 (1981), where the Supreme Court held that a state tort action was adequate post deprivation due process for a prisoner who claimed that his personal property had been negligently destroyed by prison officials. *See also* Natural Resources Comm'n v. Sullivan, 428 N.E.2d 92 (Ind. Ct. App. 1981) (The Fourth District of the Indiana Court of Appeals held that a post deprivation full evidentiary hearing can cure the failure to provide a public employee an opportunity to rebut charges prior to his demotion.).

¹⁴²*Compare* Natural Resources Comm'n v. Sullivan, 428 N.E.2d 92 (Ind. Ct. App. 1981) (The court found due process satisfied by an evidentiary hearing held a year after a demotion, even though the predemotion procedures were concededly inadequate. The

In *City of Terre Haute v. Brighton*,¹⁴³ however, the Indiana Court of Appeals for the Fourth District held that similar provisions in the policemen and firemen's tenure act required notice and a full hearing *before* the city could demote three firemen protected by the "just cause" provisions of the Indiana Act.¹⁴⁴ According to the court, the Indiana statute created a property interest in retention of rank, and the nature and extent of the property interest is defined by the state statute. On this basis, the court concluded that the failure to provide a hearing *prior* to the demotion of the three firemen violated procedural due process. Relying on the procedural requirements of the statute, the court did not consider whether or not the constitution might permit the lesser protection of a post deprivation hearing.¹⁴⁵

d. Adequate notice that conduct is subject to disciplinary action.—In *Korf v. Ball State University*,¹⁴⁶ the Seventh Circuit considered the termination of a tenured university professor, whose discharge was challenged on the grounds of substantive due process. Dr. Korf was discharged on a finding by a faculty review committee that he engaged in unethical conduct by soliciting and maintaining homosexual relations with his students. The conduct was found to violate provisions of the American Association of University Professors (AAUP) Statement of Professional Ethics, adopted by the university and included in the faculty handbook. The AAUP Guidelines provide in relevant part:

As a teacher, the professor encourages the free pursuit of learning in his students. . . . He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor. . . . He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them.¹⁴⁷

delay, according to the court, was unexplained, but the court did not discuss the possible effect of the delay on the due process analysis.).

¹⁴³450 N.E.2d 1039 (Ind. Ct. App. 1983).

¹⁴⁴IND. CODE § 18-1-11-3 (repealed 1982) provided in relevant part:

Every member of the fire . . . forces . . . shall hold office *or grade* until they are removed by [the Board of Public Works and Safety]. They may be removed for any *cause* other than politics, after written notice . . . notifying him or her of the time and place of hearing, and after an opportunity for a hearing is given. . . . On . . . a decision of the board that any member has been or is guilty of neglect of duty . . . such commissioners shall have power to punish the offending party by . . . reducing him or her to a lower grade and pay.

IND. CODE § 18-1-11-3 (repealed 1982)(emphasis added)(similar version at IND. CODE § 36-8-3-4 (Supp. 1984)).

¹⁴⁵From its earlier decision in *Natural Resources Comm'n v. Sullivan*, 428 N.E.2d 92 (Ind. Ct. App. 1981), it appears that the adequacy of due process post deprivation remedies depends, in the eyes of this court, upon the procedures established by the governing state law. See *supra* note 142.

¹⁴⁶726 F.2d 1222 (7th Cir. 1984).

¹⁴⁷726 F.2d at 1224 n.2 (quoting *Ball State University, Faculty Handbook*, at II-7 (court's emphasis deleted)).

Dr. Korf asserted, and it was not disputed, that this language had never been applied to private consensual sexual activity between a teacher and student, nor had any professor ever been discharged at Ball State because of sexual activity.¹⁴⁸

Korf's substantive due process claim was based generally on alleged arbitrariness in the enforcement of the faculty code with respect to his termination. More specifically, Korf asserted that the absence of any language in the ethical guidelines relating to sexual conduct and the lack of any previous enforcement of the guidelines against sexual activity rendered the sudden enforcement against him unconstitutional. According to Korf, the lack of clear guidelines and prior enforcement precluded him from receiving adequate notice that his conduct could subject him to termination.

The court, however, disagreed fundamentally with Korf's characterization of his own conduct. Relying on its own reading of the administrative record, the court noted that Korf's sexual advances were often unwelcome and annoying to students, and that Korf offered money and favors to students with whom he was sexually involved. In the court's view, this conduct went beyond the bounds of "private consensual sexual activity" and was so patently unethical by its nature that "he should have understood both the standards to which he was being held and the consequences of his conduct."¹⁴⁹ Because the court further concluded that the university's conduct with respect to Korf's discharge was "reasonable and rationally related to the duty of the University to provide a proper academic environment,"¹⁵⁰ the court found no violation of the plaintiff's substantive due process rights as a matter of law and affirmed the district court's grant of summary judgment in favor of the defendant university.

¹⁴⁸Korf asserted that his discharge violated the equal protection clause as well as substantive due process. The court rather summarily rejected this claim. While Korf asserted in his affidavit that many Ball State professors maintained private consensual heterosexual and homosexual relationships with students and were not subject to discipline for this activity, the court concluded that this general allegation did not create a factual issue because Korf was discharged for exploitation of students for private purposes, not for private sexual activity. In the court's view, Korf failed to establish any class based discrimination subject to protection under the equal protection clause. 726 F.2d at 1229.

¹⁴⁹*Id.* at 1228.

¹⁵⁰*Id.* at 1229.

V. Criminal Law and Procedure

STEPHEN J. JOHNSON*

A. Crimes

1. *Statutory Developments.*—*a. Generally.*—During the survey period, the Indiana legislature did not enact any sweeping revisions of criminal law or procedure. Nonetheless, some portions of Indiana's penal code were amended or augmented in significant ways.¹ Additionally, several new criminal laws were enacted during the last year.²

b. Sex crimes.—The definition of "deviate sexual conduct" in the penal code was amended to include not only acts which traditionally have been thought of as sodomy, but also to include "the penetration of the sex organ or anus of a person by an object."³ This offense had been previously punished as the crime of criminal deviate conduct.⁴ The amendment was designed to alleviate gaps in the law that had developed because Indiana had a general definition for "deviate sexual conduct"⁵ and a specific crime of "criminal deviate conduct"⁶ which included acts of deviate sexual conduct. The term "deviate sexual conduct" is used in a number of different sex offense statutes,⁷ but, as previously defined, the term did not include the penetration of a sex organ or the anus by an object. Thus, for example, it was the crime of criminal deviate conduct to insert an inanimate object into the sex organ of a victim, but it was not child molesting to commit the same act on a child. This incongruity was remedied by the amendment to the term "deviate sexual conduct."

The Indiana legislature also enacted a statute creating two new offenses designed to punish certain forms of sexual behavior or attempted

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¹See *infra* notes 3-7, 15, 18-24 and accompanying text.

²See *infra* notes 8-14, 17 and accompanying text.

³Act of Feb. 29, 1984, Pub. L. No. 183-1984, § 1, 1984 Ind. Acts. 1497 (codified at IND. CODE § 35-41-1-9 (Supp. 1984)).

⁴IND. CODE § 35-42-4-2(b) (1982).

⁵IND. CODE § 35-41-1-2 (1982) (repealed 1983) defined "deviate sexual conduct" generally as "an act of sexual gratification involving a sex organ of one person and the mouth or anus of another person." *Id.*

⁶IND. CODE § 35-42-4-2 (1982).

⁷See IND. CODE § 35-42-4-3 (1982) (child molesting); IND. CODE § 35-42-4-4 (Supp. 1984) (child exploitation); IND. CODE § 35-45-4-2 (Supp. 1984) (prostitution); IND. CODE § 35-46-1-3 (1982) (incest); IND. CODE § 35-49-1-9 (Supp. 1984) (obscenity). Additionally, two newly enacted criminal statutes utilize the term "deviate sexual conduct." See IND. CODE § 35-42-4-5 (Supp. 1984) (vicarious sexual gratification); IND. CODE § 35-42-4-6 (Supp. 1984) (child solicitation).

sexual behavior with children.⁸ The state's existing child molesting statute,⁹ strictly interpreted, neither punished someone who forced a child to fondle himself or another person, nor punished someone who forced a child to have sexual relations with a person other than the defendant. It was assumed that persons seeking to abuse children sexually would be the direct recipients of some form of physical contact with the child. This assumption overlooked those who derive pleasure from watching a child commit a sexual act with someone else. As a result, a new offense, vicarious sexual gratification, was created to prohibit this form of child sexual abuse.¹⁰ It prohibits a person eighteen years of age or older from directing, aiding, inducing, or causing a child to fondle himself or another child, or to engage in sexual intercourse, deviate conduct, or bestiality "with intent to arouse or satisfy the sexual desires of a child or the older person."¹¹

The second new offense, child solicitation, prohibits a person more than eighteen years of age from soliciting a child under twelve years of age to engage in sexual intercourse, deviate sexual conduct, or fondling.¹² The new statute is designed to reach conduct that could be described as an attempted child molestation. Such conduct, however, is probably not within the reach of Indiana's general attempt statute¹³ because mere verbal communication to the child might not be considered enough of a "substantial step" toward completion of the crime to constitute an attempt.¹⁴

The legislature amended a third sex offense statute to punish as indecent exposure the activities of one who engages in sexual conduct

⁸Act of Feb. 29, 1984, Pub. L. No. 183-1984, §§ 4-5, 1984 Ind. Acts 1497, 1499-1500 (codified at IND. CODE §§ 35-42-4-5, -6 (Supp. 1984)).

⁹IND. CODE § 35-42-4-3 (1982).

¹⁰Act of Feb. 29, 1984, Pub. L. No. 183-1984, § 4, 1984 Ind. Acts 1497, 1499 (codified at IND. CODE § 35-42-4-5 (Supp. 1984)).

¹¹IND. CODE § 35-42-4-5 (Supp. 1984).

¹²Act of Feb. 29, 1984, Pub. L. No. 183-1984, § 5, 1984 Ind. Acts 1497, 1499 (codified at IND. CODE § 35-42-4-6 (Supp. 1984)).

¹³IND. CODE § 35-41-5-1 (1982) provides in part: "A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime." *Id.*

¹⁴The drafters of Indiana's penal code relied heavily upon the Model Penal Code, but chose not to adopt the general solicitation offense defined in the model act. MODEL PENAL CODE § 5.02 (Proposed Official Draft 1962) defines criminal solicitation:

A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

Id. If the Indiana penal code drafters had included the general solicitation offense, the newly enacted child solicitation statute would not have been necessary.

in other than a public place with the intent that he or she be seen by other persons.¹⁵ The amendment was intended to prohibit the activities of someone who stands in front of his picture window inside his house while committing some form of public indecency. The legislature apparently believed that this conduct could not be considered "public" indecency because the offender would be on his own private property at the time of the act. No Indiana appellate decision, however, has ever construed the public indecency statute so narrowly, and decisions from other jurisdictions indicate that this kind of activity could be considered to be in a "public place."¹⁶

c. Miscellaneous.—The legislature expanded the chapter dealing with offenses against the family to include protection for persons more than sixty years old who are classified as "endangered adults."¹⁷ This provision was designed to give endangered adults the kind of protection presently afforded child abuse or neglect victims.

In addition, the legislature broadened the scope of conduct that will elevate the charge of resisting law enforcement from a Class A misdemeanor to a Class D felony.¹⁸ Under the new law, if a person "operates a vehicle in a manner that creates a substantial risk of bodily injury to another person"¹⁹ while resisting law enforcement, that person commits a Class D felony.

Finally, the legislature changed the grade of offense in three kinds of criminal activities. First, Indiana's robbery statute was amended to lower the grade of felony to Class B when robbery "results in bodily

¹⁵Act of Mar. 5, 1984, Pub. L. No. 189-1984, § 1, 1984 Ind. Acts 1506 (codified at IND. CODE § 35-45-4-1 (Supp. 1984)).

¹⁶See *State v. Vega*, 38 Conn. Supp. 313, 444 A.2d 927 (1982); *Hester v. State*, 164 Ga. App. 871, 298 S.E.2d 292 (1982); *People v. Legel*, 24 Ill. App. 3d 554, 321 N.E.2d 164 (1974).

¹⁷Act of Feb. 24, 1984, Pub. L. No. 185-1984, 1984 Ind. Acts 1501 (codified at IND. CODE §§ 35-42-2-1, 35-46-1-1-, 35-36-1-12, 35-46-1-13, 35-46-1-14 (Supp. 1984)). An "endangered adult" is defined as

a person sixty (60) years of age or older who is unable to protect his interests and who is harmed or threatened with harm by either himself or another person as a result of:

- (1) failure to comprehend either the nature of his situation or the consequences of the continuation of his situation;
- (2) incompetence;
- (3) neglect;
- (4) battery; or
- (5) exploitation of the person's personal services or property.

IND. CODE § 35-46-1-1 (Supp. 1984).

¹⁸Act of Feb. 29, 1984, Pub. L. No. 188-1984, 1984 Ind. Acts 1505 (codified at IND. CODE § 35-44-3-3 (Supp. 1984)).

¹⁹IND. CODE § 35-44-3-3 (Supp. 1984).

injury to any person other than a defendant.”²⁰ Formerly, a robbery that resulted in any form of bodily injury was a Class A felony.²¹ Class A felony status was retained only in cases in which “serious bodily injury” happens to one other than a defendant.²² Second, the legislature raised the penalty for leaving the scene of an accident that causes serious bodily injury or death from a Class B misdemeanor to a Class D felony.²³ Third, the intimidation statute was amended to make it a Class D felony to threaten a judge.²⁴

2. *Assisting a Criminal*.—In a 1983 decision, the Indiana Court of Appeals interpreted the “assisting a criminal” statute.²⁵ In *Moore v. State*²⁶ the defendant was charged with murder and attempted murder. He eventually was convicted of assisting a criminal. On appeal, the defendant argued that he could not be convicted of a crime with which he was never charged and which was not a lesser included offense of the crimes charged. The State argued that assisting a criminal was a lesser included offense of murder or attempted murder, and alternatively that even if it were not a lesser included offense, the defendant invited any error in the verdict by tendering an instruction on assisting a criminal as a lesser included offense.²⁷

The court agreed with the State’s invited error argument and sustained the assisting a criminal conviction.²⁸ The court stated, “assisting a criminal is a lesser included offense of murder and attempted murder.”²⁹ The court’s authority for that statement, *Smith v. State*,³⁰ is of questionable value. The court in *Smith* held that when a person is convicted of robbery, murder, and assisting a criminal, the assisting conviction merges into the murder and robbery convictions “as an included offense in the commission of those crimes.”³¹ By phrasing its decision in terms of the lesser included offense and merger doctrines, the Indiana Supreme Court, in *Smith*, confused the point it apparently was trying to make clear.

²⁰Act of Feb. 24, 1984, Pub. L. No. 186-1984, 1984 Ind. Acts 1504 (codified at IND. CODE § 35-42-5-1 (Supp. 1984)).

²¹IND. CODE § 35-42-5-1 (1982).

²²IND. CODE § 35-42-5-1 (Supp. 1984).

²³Act of Feb. 24, 1984, Pub. L. No. 76-1984, §1, 1984 Ind. Acts 942 (codified at IND. CODE § 9-4-1-40(b) (Supp. 1984)).

²⁴Act of Feb. 29, 1984, Pub. L. No. 183-1984, § 6, 1984 Ind. Acts 1497 (codified at IND. CODE § 35-45-2-1(a)(Supp. 1984)).

²⁵IND. CODE § 75-44-3-2 (1982).

²⁶445 N.E.2d 576 (Ind. Ct. App. 1983).

²⁷*Id.* at 578.

²⁸*Id.*

²⁹*Id.* (citing *Smith v. State*, 429 N.E.2d 956, 959 (Ind. 1982)).

³⁰429 N.E.2d 956 (Ind. 1982).

³¹*Id.* at 959.

The assisting a criminal statute is designed to reach conduct that would have been within the traditional accessory after the fact crime.³² Its objective is to punish someone who assists a criminal's escape after the criminal has committed a crime.³³ Given that statutory purpose, it would be anomalous to punish someone as both the principal in a crime and as an accessory to that crime, even if he assisted his accomplice's escape instead of his own. The general rule has been that a person cannot be both the principal in a crime and an accessory after the fact.³⁴ This appears to be the theory of law the Indiana Supreme Court was trying to express in *Smith*, but its description in terms of greater and lesser included offenses confused the issue.

Indeed, after applying the rules for determining when one offense is included in another, it is difficult to conceive of a situation in which assisting a criminal would be an included offense of murder.³⁵ In 1984, the Indiana Supreme Court recognized this fact in *Reynolds v. State*³⁶ and declared that the court of appeals' view in *Moore* was overly broad: "Assisting a criminal is not, in every instance, a lesser included offense of murder."³⁷ The court said it was obvious that one may commit a murder without committing the crime of assisting a criminal. Therefore, assisting a criminal is not an "inherently included" lesser offense of murder, although it may be a "possibly included" lesser offense of murder.³⁸ The outcome of the lesser included offense inquiry depends upon the language of the charging instrument for murder.

3. *Burglary*.—In the last year, several Indiana courts clarified the key terms, "dwelling," "structure," and "breaking," contained in the

³²IND. CODE ANN. § 35-44-3-2 Indiana Criminal Law Commission Comments (West 1978).

³³IND. CODE § 35-44-3-2 (1982) provides in pertinent part:

A person not standing in the relation of parent, child, or spouse to another person who has committed a crime or is a fugitive from justice who, with intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the person commits assisting a criminal, a Class A misdemeanor.

Id.

³⁴W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 523 (1972) [hereinafter cited as LAFAVE & SCOTT] R. PERKINS, CRIMINAL LAW 669 (2d ed. 1969).

³⁵See *Lawrence v. State*, 268 Ind. 330, 375 N.E.2d 208 (1978); *Roddy v. State*, 182 Ind. App. 156, 394 N.E.2d 1098 (1979).

³⁶460 N.E.2d 506 (Ind. 1984).

³⁷*Id.* at 509.

³⁸The court explained the difference between the two types of included offenses identified in Indiana case law: "The 'inherently included' lesser offense exists when, by definition, it is impossible to commit the greater offense without committing the lesser offense. An offense is 'possibly included' depending upon the manner and means allegedly employed in the commission of the charged crime." 460 N.E.2d at 510 (citing *Roddy v. State*, 182 Ind. App. 156, 168, 394 N.E.2d 1098, 1105-06 (1979)).

burglary statute.³⁹ In *Joy v. State*,⁴⁰ five men surreptitiously entered a lumber yard enclosed by a fence. A sixth man, the defendant, drove the others to the lumber yard and gave them a list of items he wanted stolen. While the defendant remained outside, the other five apparently hopped the fence and removed lumber from storage sheds that were completely open on one side. The fence surrounding the lumber yard was cut with a pair of wire cutters so the lumber could be taken out through the opening and loaded onto a waiting semitrailer.⁴¹

The issue before the court of appeals was whether or not the fence and open storage sheds were "buildings or structures" within the meaning of the burglary statute. The defendant contended they were not, supporting his argument with a Texas case that held that a defendant did not commit burglary when he cut through a chain link fence surrounding a lumber yard, entered through an open doorway of a building, and removed some lumber.⁴² The Indiana Court of Appeals distinguished the Texas decision because of differences between the Indiana and Texas burglary statutes. The Texas statute prohibited only burglary of a "building," while the Indiana statute prohibited burglary of a "building or structure."⁴³ The court noted that the Texas decision was based on a holding that the fence was not a "building," and that entering through an open door was not a "breaking."

The Indiana Court of Appeals went on to conclude that the fence surrounding the lumber yard was a "structure" under Indiana's burglary statute.⁴⁴ This conclusion focused on whether the fence surrounding the lumber yard was clearly "for the purpose of protecting property within its confines and [was], in fact, an integral part of a closed compound."⁴⁵

³⁹IND. CODE § 35-43-2-1 (1982) provides:

A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or if the building or structure is a dwelling, and a Class A felony if it results in either bodily injury or serious bodily injury to any person other than a defendant.

Id.

⁴⁰460 N.E.2d 551 (Ind. Ct. App. 1984).

⁴¹*Id.* at 555.

⁴²*Id.* at 557 (citing *Day v. State*, 534 S.W.2d 681 (Tex. 1976)).

⁴³IND. CODE § 35-43-2-1 (1982) (emphasis added); see 460 N.E.2d at 557 n.7.

⁴⁴460 N.E.2d at 558. The court relied in part on four decisions from other jurisdictions that held that breaking into a fenced enclosure was burglary. See *People v. Moyer*, 635 P.2d 553, (Colo. 1981) (fenced dog kennel was an "occupied structure" under burglary statute); *Stanley v. State*, 512 P.2d 829 (Okla. Crim. App. 1973); *State v. Roadhs*, 71 Wash. 2d 705, 430 P.2d 586 (1967); *State v. Livengood*, 14 Wash. App. 203, 540 P.2d 480 (1975).

⁴⁵460 N.E.2d at 558 (quoting *State v. Roadhs*, 71 Wash. 2d 705, 708-09, 430 P.2d 586, 588 (1967)).

This will continue to be the test for determining whether or not a burglary has been committed when property enclosed by a fence has been entered with the intent to commit a felony therein. Because the court interpreted the word "structure" in the burglary statute to include the fence, it did not answer the question of whether the open storage sheds inside the fence were buildings or structures.

A secondary issue raised was whether there was sufficient evidence at trial to prove that a breaking had occurred.⁴⁶ The evidence was unclear as to how entry into the lumber yard was made. It was possible that the defendant's accomplices simply cut through the fence and entered the lumber yard that way; if so, it is certain that this would constitute a breaking. It was also possible that the burglars climbed over the fence and later cut through it to "break out" of the lumber yard. Prior to this case, it was unclear whether climbing over a fence would constitute a breaking.⁴⁷ Breaking has generally been interpreted to require at least the use of some slight force to gain entry, such as pushing open a door or turning a door handle.⁴⁸ Merely walking through an open door does not constitute a breaking.⁴⁹ Thus, the *Joy* case raised an interesting issue as to whether hopping over a fence constitutes a breaking. The court of appeals held that it does:⁵⁰

We perceive no difference in our conclusion depending on how the confederates got past the fence. Whether they hopped over it, drove through it, or cut it with wire cutters is of no import. The fact that they crossed over a structure intended to keep them out is sufficient to establish a breaking occurred.⁵¹

While this interpretation of breaking has much to commend it, there may be difficulty in reconciling it with the general common law rule that merely crossing an imaginary line does not constitute a breaking.⁵² Nevertheless, a fence is not a mere imaginary boundary. It is designed as a form of security to keep intruders out. Scaling a fence is much more intrusive than walking across an invisible line on the ground. If

⁴⁶460 N.E.2d at 556.

⁴⁷Alternatively, one might argue that even if climbing the fence was not a breaking, cutting through the fence to make an exit was a breaking. It is a matter for debate whether or not "breaking out" constitutes a breaking for purposes of a burglary statute. See LAFAVE & SCOTT, *supra* note 34, at 197.

⁴⁸See, e.g., *Howard v. State*, 433 N.E.2d 753 (Ind. 1982); *Jacobs v. State*, 454 N.E.2d 894 (Ind. Ct. App. 1983); *McCormick v. State*, 178 Ind. App. 206, 382 N.E.2d 172 (1978).

⁴⁹See, e.g., *Passwater v. State*, 248 Ind. 454, 229 N.E.2d 718 (1967). *But cf.* *Smith v. State*, 454 N.E.2d 412 (Ind. 1983).

⁵⁰460 N.E.2d at 558-59.

⁵¹*Id.* at 559 n.8.

⁵²4 W. BLACKSTONE, COMMENTARIES 226 (1857); R. PERKINS, *supra* note 34, at 192 (2d ed. 1969); Annot., 70 A.L.R.3d 881 (1976).

the gate to the fence had been unlocked and the burglars had exerted the slightest effort to open it, their actions would be a breaking. It is difficult to see why surmounting the same obstacle by climbing over it, with the same intent to steal, should not be punishable as burglary.⁵³

Whether the burglarized place is ultimately defined as a "building" or a "structure" will make little difference to most defendants charged with burglary. If the burglary is of either a building or a structure, it will be punished as a Class C felony.⁵⁴ The important question for burglars will be whether or not the building fits the definition of a "dwelling," because burglary of a dwelling is a Class B felony.⁵⁵

In *Jones v. State*,⁵⁶ the issue was whether a vacation cabin was a dwelling within the meaning of the burglary statute.⁵⁷ The victim's vacation cabin was a three-room log structure, furnished sparsely and used as a sportsman's retreat. The owner was in the process of repairing the cabin and slept overnight there on the day of the burglary.⁵⁸ It was not the owner's principal place of residence.

On appeal, the defendant argued that he did not burglarize *a dwelling*. He relied on three Indiana cases that held that temporary retreats or vacation homes do not qualify as dwellings.⁵⁹ The court of appeals characterized the holdings on which the defendant relied as nullities because of significant statutory developments since the earlier cases.⁶⁰ The burglary statute in effect at the time of those decisions made it the crime of first degree burglary to break and enter "any dwelling house or other place of human habitation."⁶¹ In contrast, the court of appeals emphasized the broader terminology in the current statutory definition of "dwelling," concluding that the Indiana legislature intended a less

⁵³Finally, it should be noted that the Indiana Court of Appeals held that the trial court did not abuse its discretion in refusing the defendant's tendered instructions defining "building or structure" and "breaking and entering." 460 N.E.2d at 565. The court noted that a trial court has discretion to permit a jury to rely on its common sense understanding of words that are not terms of art. *Id.* The court's correct resolution of this issue seems somewhat ironic given the amount of effort the appeals court engaged in when analyzing the meanings of "structure" and "breaking."

⁵⁴IND. CODE § 35-43-2-1 (1982).

⁵⁵*Id.* The difference in penalty is what makes the difference in definitions significant. One may burglarize a building or a structure without burglarizing a dwelling. *See Goodpaster v. State*, 273 Ind. 170, 175, 402 N.E.2d 1239, 1242 (1980).

⁵⁶457 N.E.2d 231 (Ind. Ct. App. 1983).

⁵⁷*Id.* at 233. Unlike the terms "building" or "structure," there is a statutory definition of "dwelling." The term means "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging." IND. CODE § 35-41-1-10 (Supp. 1984).

⁵⁸457 N.E.2d at 233.

⁵⁹*Id.* (citing *Smart v. State*, 244 Ind. 69, 190 N.E.2d 650 (1963); *Carrier v. State*, 227 Ind. 726, 89 N.E.2d 74 (1949); *Middleton v. State*, 181 Ind. App. 232, 391 N.E.2d 657 (1979)).

⁶⁰457 N.E.2d at 234.

⁶¹IND. CODE § 10-701 (Burns 1956) (current version at IND. CODE 35-43-2-1 (1982)).

restrictive interpretation of the term, one which includes a vacation cabin.⁶² In an alternative ground for its holding, the court observed that one of the earlier cases held that a recreational cabin might be a dwelling if it were occupied at the time the break-in occurred.⁶³ Under the rule of that case, the vacation cabin in *Jones* would still be considered a dwelling.

Finally, in *Gaunt v. State*,⁶⁴ the defendant broke and entered into an attached garage and removed some property. The garage was attached to the house through an interior door and was used for family storage. Although by entering the garage the defendant did not have immediate access to the actual living quarters of the house, the supreme court held that the defendant had, nonetheless, entered a private part of the victims' dwelling and was thus guilty of burglary of a dwelling.⁶⁵

The decisions of *Joy*, *Jones*, and *Gaunt* represent the courts' continuing common sense, expansive interpretations of Indiana's burglary statute, a trend away from strict adherence to a traditional common law concept of burglary. The trend is appropriate because, as one commentator has noted, "Of all common law crimes, burglary today perhaps least resembles the prototype from which it sprang."⁶⁶

4. *Disorderly Conduct*.—From the standpoint of legal analysis, disorderly conduct cases are some of the most interesting because they often involve a free speech issue. Two cases decided during the survey period, *Cavazos v. State*⁶⁷ and *Mesarosh v. State*,⁶⁸ illustrate the point.

In *Cavazos*, a police officer arrested the defendant's brother for disorderly conduct after a heated argument in a tavern. Afterward, the defendant began to yell at the police officer as he was placing handcuffs on her brother. The defendant came to the front of the gathering crowd and yelled at the officer again, calling him an "asshole." The officer told the defendant to be quiet, but she loudly persisted.⁶⁹ The defendant was arrested for disorderly conduct.⁷⁰ Her conviction was reversed by the Second District Indiana Court of Appeals.⁷¹

⁶²457 N.E.2d at 234.

⁶³*Id.* (citing *Smart v. State*, 244 Ind. 69, 190 N.E.2d 650 (1963)).

⁶⁴457 N.E.2d 211 (Ind. 1983).

⁶⁵*Id.* at 213-14 (citing *Abbott v. State*, 175 Ind. App. 365, 371 N.E.2d 721 (1978); *Burgett v. State*, 161 Ind. App. 157, 314 N.E.2d 799 (1974)).

⁶⁶Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 411 (1951).

⁶⁷455 N.E.2d 618 (Ind. Ct. App. 1983).

⁶⁸459 N.E.2d 426 (Ind. Ct. App. 1984).

⁶⁹455 N.E.2d at 619.

⁷⁰The disorderly conduct charge was based on IND. CODE § 35-45-1-3(2) (1982): "A person who recklessly, knowingly, or intentionally . . . makes unreasonable noise and continues to do so after being asked to stop . . . commits disorderly conduct, a Class B misdemeanor." *Id.*

⁷¹455 N.E.2d at 621.

The sole issue on appeal was whether or not there was sufficient evidence to support a conviction for disorderly conduct. The elements of that offense are: (1) recklessly, knowingly, or intentionally; (2) making unreasonable noise; (3) which continues; (4) after being asked to stop.⁷² In this case, the defendant yelled at the arresting officer, was told to be quiet, continued to yell at the officer, called him an asshole, was again told to be quiet, and still continued yelling. The only issue before the court was whether or not the noise was unreasonable. The court of appeals noted that speech punished by a disorderly conduct statute must fall into one of the four categories of speech unprotected by the constitutional guarantee of freedom of speech—obscenity, fighting words, public nuisance speech, or an incitement to imminent lawless action.⁷³

The court of appeals easily rejected a theory that the defendant's language rose to the level of obscenity.⁷⁴ The court also said that the noise did not constitute a public nuisance that invaded privacy interests. Although the defendant's speech was loud, the court said, "Evidence of loudness, standing by itself, does not constitute evidence of unreasonable noise in the public nuisance sense."⁷⁵ Whether the loudness was unreasonable must be determined from the surrounding circumstances. The noise at issue was made in a bar with a band playing fifty feet away, and there was no evidence that the defendant spoke louder than anyone else or louder than was necessary to be heard. Therefore, the court concluded that the speech was not unreasonable noise in the public nuisance sense.⁷⁶ Nor was the defendant's speech an incitement to immediate lawless action. Although the defendant's conduct agitated the crowd, the court said there was no evidence that her speech was "directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action."⁷⁷

The remaining form of constitutionally unprotected speech, fighting words, drew the most attention from the court. The basic definition of "fighting words" is words "which by their very utterance . . . inflict injury or tend to incite an immediate breach of the peace."⁷⁸ According

⁷²*Id.* at 619.

⁷³*Id.* at 620 (citing *Hess v. Indiana*, 414 U.S. 105 (1973)). The majority emphasized, "we are *assuming* and *do not decide* 'unreasonable noise' as used in [IND. CODE §] 35-45-1-3(2) criminalizes the foregoing categories of constitutionally unprotected speech." 455 N.E.2d at 620.

⁷⁴455 N.E.2d at 620.

⁷⁵*Id.* at 621.

⁷⁶*Id.* at 620.

⁷⁷*Id.* at 621 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

⁷⁸455 N.E.2d at 619 (quoting *Stults v. State*, 166 Ind. App. 461, 468, 336 N.E.2d 669, 673 (1975)). Another definition of fighting words is "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge,

to the court, "It may be a question of fact whether the words in question constitute 'fighting words.' However, where all reasonable persons would agree the words are not 'fighting words' the question becomes one of law."⁷⁹ Because of the free speech element, less deference is paid by an appellate court to the factfinder's determination that the evidence is sufficient to sustain a conviction. The question of sufficiency of the evidence in such cases is a mixed question of law and fact, perhaps more so than for any other criminal offense. The majority methodically evaluated the facts to decide whether or not the defendant's speech constituted fighting words. The defendant's original outburst, that the officer had a grudge against her brother and had no right to arrest him, was not considered to be fighting words because, as a matter of law, they could not reasonably provoke a listener to violent action.⁸⁰ Additionally, as a matter of law, the term "asshole" is not so inflammatory that when addressed to an ordinary citizen it is inherently likely to provoke violent action. The court stated, "While the word is indeed derogatory, it does not describe, reference, or characterize national origin, race, religion, sex, or parentage, categories into which fighting words now commonly fall."⁸¹ Finally, even if the word "asshole" were considered a fighting word, it could not support a conviction for disorderly conduct because the speech preceding or following it was not unreasonable noise.⁸²

The second disorderly conduct case, *Mesarosh v. State*,⁸³ also focused on words spoken by a bystander as he objected to the arrest of another person. After the defendant's companion was arrested, both he and the defendant began to shout loudly and profanely.⁸⁴ A crowd gathered to watch, and although some of the spectators may have been shouting, no one attempted to interfere with the arrest.

inherently likely to provoke violent action." 455 N.E.2d at 619 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

⁷⁹455 N.E.2d at 619.

⁸⁰*Id.* at 619-20.

⁸¹*Id.* at 620.

⁸²*Id.* Chief Judge Buchanan wrote a vigorous dissent. In it he contended that the word "asshole" was a fighting word and thus unprotected speech. *Id.* at 622. In addition, because the defendant disobeyed the officer's order to be quiet after uttering the "fighting word," the dissent would have permitted an inference of unreasonable noise even without testimony as to the specific content of her second outburst. *Id.* Finally, Judge Buchanan stated that even before the defendant used the word "asshole" she had spoken fighting words because of the circumstances in which they were uttered. *Id.*

⁸³459 N.E.2d 426 (Ind. Ct. App. 1984).

⁸⁴The defendant shouted, "Look at this shit going on here." Brief for Appellant at 4, *Mesarosh v. State*, 459 N.E.2d 426 (Ind. Ct. App. 1984). "[F]uck you pigs, all you want to do is pick on us, we're going to get your ass. I'm going to see you in court. I'll get you mother fuckers, you son-of-a-bitches." Brief for Appellant at 5, *Mesarosh v. State*, 459 N.E.2d 426 (Ind. Ct. App. 1984).

The defendant was arrested and convicted of disorderly conduct for making unreasonable noise after being asked to stop.⁸⁵ The fourth district court of appeals agreed with the second district's analysis in *Cavazos* that there are four basic categories of unprotected speech which may be punished criminally.⁸⁶ However, unlike *Cavazos*, the *Mesarosh* court affirmed the disorderly conduct conviction on the "fighting words" theory.⁸⁷ The fourth district stated that fighting words are "'personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent action.'"⁸⁸ The words must be a face to face personal insult, and a determination of whether the words are personally abusive must be based on an objective rather than a subjective standard.⁸⁹ The fourth district compared the second district's *Cavazos* case, but said it would apply the dissent's rationale and hold that the speech in *Mesarosh* crossed the line into constitutionally unprotected expression.⁹⁰

In both *Cavazos* and *Mesarosh*, the alleged "unreasonable noise" was created by the defendants' objections to the arrests of others. The "noise" in both cases was directed at police officers. Both defendants employed unfavorably descriptive terms when insulting the police officers. Both used words which would probably, even today, be considered profane, although the speech was not obscene. This is where the similarities end. The defendant in *Mesarosh*, in simple numbers, used more profanity than did the defendant in *Cavazos*. Additionally, if there can be degrees of offensive language, the language in *Mesarosh* was probably worse. The shouting in *Mesarosh* occurred outside a building, apparently with enough volume to draw spectators from other buildings. The shouting in *Cavazos* occurred in a noisy bar. Therefore, from a nuisance speech standpoint, the noise in *Mesarosh* was far more likely to be unreasonable noise. Judge Young's concurring opinion in *Mesarosh* appears correct on this point. Also, in the context of all the facts in *Mesarosh*, the speech was probably not an incitement to imminent lawless action. The shouting occurred in the open street, apparently with more

⁸⁵459 N.E.2d at 427. The defendant's conviction was based on the same statute discussed in *Cavazos*. See *supra* text accompanying note 70.

⁸⁶459 N.E.2d at 427-28.

⁸⁷*Id.* at 430.

⁸⁸*Id.* at 428 (quoting *Commonwealth v. A Juvenile*, 368 Mass. 580, 591, 334 N.E.2d 617, 624-25 (1975) (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971))).

⁸⁹459 N.E.2d at 428.

⁹⁰*Id.* at 429-30. In a separate concurrence, Judge Young wrote that the conduct in *Mesarosh* was disorderly simply because the noise was unreasonably loud. *Id.* at 430. "[T]he content of the loud noise is irrelevant. A person could violate the statute by reading the scriptures in an unreasonably loud manner. This is not an obscenity case." *Id.*

than one police officer preent, and many of the spectators merely watched.

The same, however, cannot be said of the facts in *Cavazos*, where a lone police officer was attempting to arrest a person in a confined area in a bar at one o'clock in the morning while the arrestee's sister shouted at him. Indeed, the officer in *Cavazos* was assaulted. The majority in *Cavazos* emphasized that the defendant's speech was not "directed to" inciting immediate lawless action: "She was simply arguing with a policeman about whether her brother should be arrested."⁹¹ The *Cavazos* court failed to recognize that speech can be an incitement to immediate lawless action even if the speaker does not literally say "Let's riot!" On the other hand, the state ought not punish as disorderly conduct a speech like Marc Antony's "Friends, Romans, countrymen"⁹² address simply because it eventually does lead to a riot. But if Marc Antony delivered his oration in the closed quarters of a bar at one o'clock in the morning where one individual representing authority is surrounded by eight intoxicated persons, a different conclusion would be warranted. While the court in *Cavazos* insisted that nuisance speech must be considered in the entire context in which it is delivered, the context of the speech was virtually ignored when determining whether or not it was an incitement to immediate lawless action. Furthermore, as was pointed out by the fourth district in *Mesarosh*, it is not always easy to pigeonhole speech in one category or another; there is often a substantial overlap between the imminent lawless action and fighting words exceptions.⁹³

Viewing these cases, it is easy to see how a defendant might claim that the disorderly conduct statute is unconstitutionally vague.⁹⁴ During the last year, the first district court of appeals avoided that question, but did hold that an indictment or information alleging that the defendant committed disorderly conduct by engaging in "tumultuous conduct"⁹⁵ must allege the specific facts which comprise the tumultuous conduct.⁹⁶ A prosecuting attorney would be well advised to also specifically allege

⁹¹455 N.E.2d at 621.

⁹²W. SHAKESPEARE, *The Tragedy of Julius Caesar*, THE COMPLETE SIGNET CLASSIC SHAKESPEARE 825 (2d ed. 1972).

⁹³459 N.E.2d at 428 n.3. Indiana's provocation statute, IND. CODE § 35-42-2-3 (1982), would seem to specifically punish fighting words. In *Evans v. State*, 434 N.E.2d 940 (Ind. Ct. App. 1982), the court of appeals interpreted the provocation statute in light of the fighting words doctrine.

⁹⁴Kerr, *Foreward: Indiana's Bicentennial Criminal Code*, 1975 Survey of Recent Developments in Indiana Law, 10 IND. L. REV. 1, 26 (1976). Indiana's former disorderly conduct statute was upheld against a void-for-vagueness attack in *Hess v. State*, 260 Ind. 427, 297 N.E.2d 413 (1973), *rev'd on other grounds*, 414 U.S. 105 (1973).

⁹⁵IND. CODE § 35-45-1-3(1) (1982).

⁹⁶*Gebhard v. State*, 459 N.E.2d 58, 61 (Ind. Ct. App. 1984).

the conduct which constitutes unreasonable noise when alleging disorderly conduct under that subsection.⁹⁷

5. *Homicide*.—Several decisions during the survey period clarified the holding of *Head v. State*.⁹⁸ In that case, the Indiana Supreme Court held that there can be no crime of attempted felony murder because the specific intent required for an attempt cannot be supplied by the intent necessary to prove the underlying felony.

In *Brown v. State*,⁹⁹ the defendant challenged the constitutionality of the felony murder statute¹⁰⁰ on the ground that it dispensed with the need to prove a specific intent to kill. The Indiana Supreme Court stated that the only intent the State must prove is the mens rea for the underlying felony, that the intent to kill is not an element of felony murder and that its absence did not render the statute unconstitutional.¹⁰¹ While the *Head* decision may have held that there is no crime of attempted felony murder, the court in *Brown* said this would not be extended to mean that the felony murder statute itself was unconstitutional.

The Indiana Supreme court addressed a related sentencing issue in *Anderson v. State*.¹⁰² In that case, the defendant was convicted of attempted murder and armed robbery and sentenced for both offenses. He contended that this was error because the robbery was the underlying felony for attempted murder and should have merged into it for sentencing purposes. Indiana case law holds that an underlying felony sentence merges into the sentence for felony murder.¹⁰³ The supreme court distinguished this case, however, because the defendant was convicted of *attempted* murder rather than felony murder. Therefore, the merger doctrine did not apply. Nevertheless, the court raised sua sponte the issue of whether the defendant was erroneously convicted of attempted felony murder under the *Head* decision. After reviewing the charging information, the court found that the defendant had been charged correctly with an attempted "knowing" murder rather than attempted felony murder.¹⁰⁴

⁹⁷IND. CODE § 35-45-1-3(2) (1982).

⁹⁸443 N.E.2d 44 (Ind. 1982). For a complete discussion of the case, see Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 127-28 (1984).

⁹⁹448 N.E.2d 10 (Ind. 1983).

¹⁰⁰IND. CODE § 35-42-1-1(2) (1982) provides: "A person who . . . kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery; commits murder, a felony." *Id.*

¹⁰¹448 N.E.2d at 15.

¹⁰²448 N.E.2d 1180 (Ind. 1983).

¹⁰³*Id.* at 1187 (citing *Biggerstaff v. State*, 432 N.E.2d 34, 37 (Ind. 1982); *Williams v. State*, 267 Ind. 700, 703, 373 N.E.2d 142, 144 (1978); *Chandler v. State*, 266 Ind. 440, 458, 363 N.E.2d 1233, 1243 (1977)).

¹⁰⁴448 N.E.2d at 1187.

In *Taylor v. State*,¹⁰⁵ the Indiana Court of Appeals evaluated the sufficiency of evidence supporting a reckless homicide conviction based on an automobile accident. The evidence indicated that the defendant ran a stop sign while driving forty miles an hour more than the posted limit and struck another vehicle, killing the driver and a passenger in that car. The defendant testified that he had consumed two beers on the day of the collision. He was charged with reckless homicide and driving while intoxicated.¹⁰⁶

The defendant was acquitted of driving while intoxicated. The definition of "intoxicated" under the applicable statute¹⁰⁷ described intoxication as being under the influence of intoxicants "such that there is an impaired condition of thought and action and the loss of normal control of a person's faculties to such an extent as to endanger any person."¹⁰⁸ The court of appeals held that the acquittal meant that the defendant's consumption of beer was totally irrelevant to the question of whether the defendant acted recklessly.¹⁰⁹

The remaining facts that could be weighed in the recklessness equation focused almost exclusively on the issue of excessive speed. The court of appeals said it could consider "only the fact that Taylor was driving approximately forty miles per hour over the posted speed limit in determining whether he acted recklessly."¹¹⁰ The issue had not been directly answered by the trial court. Nevertheless, the court of appeals concluded that driving forty miles an hour over the posted limit constituted recklessness.¹¹¹ The court found support in the reckless driving statute, which partially defines that offense as driving at "such an unreasonably high rate of speed . . . under the circumstances, as to endanger the safety or the property of others."¹¹² The court stated:

Initially, it would appear the Reckless Driving statute is of minimal assistance in resolving the issue before us, given the use therein of the word "recklessly." We believe, however, that the adverb "recklessly" was employed to lend flexibility to the operation of the statute. As we interpret the statute, Reckless Driving may be based on any one of the enumerated acts, but

¹⁰⁵457 N.E.2d 594 (Ind. Ct. App. 1983).

¹⁰⁶*Id.* at 596-97.

¹⁰⁷The defendant was charged under IND. CODE § 9-4-1-54 (1982), which was repealed in 1983 when Indiana's drunk driving laws were substantially revised. See Johnson, *supra* note 98, at 116.

¹⁰⁸IND. CODE § 9-11-1-5 (Supp. 1984).

¹⁰⁹457 N.E.2d at 597. The court of appeals also criticized the trial court's comments at sentencing, in which the trial judge stated his belief that the defendant was a drunken driver. *Id.* at 597 n.5.

¹¹⁰*Id.* at 597 (footnote omitted).

¹¹¹*Id.* at 598.

¹¹²*Id.* (quoting IND. CODE § 9-4-1-5.6-1 (Supp. 1984)).

proof thereof creates a presumption of recklessness which the defendant may rebut. Therefore, in certain circumstances, operating a motor vehicle at an "unreasonably high rate of speed" may be sufficient to support a conviction of Reckless Driving.¹¹³

Although the court of appeals said that operating a vehicle at an unreasonably high rate of speed might support a conviction of "Reckless Driving," it seems obvious from the context that the court meant to say "reckless homicide." Because the reckless driving statute itself specifically prohibits an unreasonably high rate of speed, it would be a non sequitur to simply declare that unreasonable speed would be reckless driving. The court said that failure to adhere to the speed limit does not necessarily constitute recklessness, because a slight deviation from the limit would not create a great risk of danger. The court also pointed out that the legislature had not defined "unreasonably high rate of speed." Yet the court declared that a speed in excess of the speed limit by forty miles an hour was unreasonable and reckless. Added to the high rate of speed were the facts that the pavement was wet and that the defendant was unfamiliar with the area. The court of appeals also stated that its determination of recklessness would stand absent the reckless driving statute, since the defendant satisfied the general intent necessary to support a conviction for reckless homicide.¹¹⁴

Although the court of appeals held that the evidence was sufficient to sustain a reckless homicide conviction, it reversed the conviction because the trial court had prohibited the defense counsel's final argument to the jury regarding the difference between negligence and recklessness. The trial court ruled that such arguments were irrelevant. The court of appeals disagreed, stating that the discussion would have aided the jury in its deliberations.¹¹⁵ A close examination of *Taylor* reveals a number of interesting aspects. At first, the court seemed to say that excessive speed, by itself, will support a finding of reckless conduct. At the same time, however, the court pointed out that the road was wet and the defendant was unfamiliar with the area. One must conclude that the recklessness of the speed is measured not simply by miles an hour exceeding the limit, but also by the driving conditions. Nor is the recklessness of the speed determined solely by whether or not it exceeds a posted speed limit. Driving slightly faster than the speed limit, without more, would not indicate recklessness. One would reasonably suppose that driving within a posted speed limit would not *necessarily* indicate the absence of reckless conduct. For example, a driver could maintain

¹¹³457 N.E.2d at 598.

¹¹⁴*Id.* The intent element for reckless homicide was defined as "a choice of action, either with the knowledge of serious danger to others involved therein or with the knowledge of facts which would disclose danger to a reasonable person." *Id.* (citations omitted).

¹¹⁵*Id.* at 599-600.

the fifty-five miles an hour speed limit on an icy road where traffic was heavy. This would certainly be reckless conduct. The court's opinion in *Taylor* suggests that the recklessness of the driver's conduct must be determined by all of the surrounding circumstances.

The *Taylor* decision initially appears to adopt a rule equivalent to "recklessness per se": that is, if the State proves an "unreasonably high rate of speed" under the reckless driving statute, the State has at least shown a presumption of recklessness which the defendant must rebut. On the other hand, "unreasonably high rate of speed" seems to be simply a different way to say "recklessness." When the State has proven that a speed was "unreasonable" it has, in effect, made its prima facie proof of recklessness. It is no more of a presumption than exists when the State makes a prima facie case in any other criminal trial.

The *Taylor* decision also indicates that an appellate court might be willing to focus on one particular act, such as the speeding in this case, and sustain a finding of reckless conduct.¹¹⁶ Previous appellate court decisions had been unwilling to find reckless conduct based on a single factor, such as intoxication, no matter how severe the impairment of driving may have been.¹¹⁷ This was a very artificial distinction to make, and an extremely restricted way to view the recklessness of conduct.

6. *Neglect.*—In the last year, the Indiana legislature enacted a series of statutes designed to give certain adults the same protection from abuse provided for children.¹¹⁸ First, a new crime, "exploitation of endangered adult," was created.¹¹⁹ The battery statute also was amended to upgrade the crime to a Class D felony if bodily injury is inflicted on an endangered adult.¹²⁰ The sentencing statute was amended to require a sentencing judge to consider whether the victim of the crime was sixty-

¹¹⁶The fact that the defendant also ran a stop sign was ignored in the case, except as a part of the statement of the facts. 457 N.E.2d at 596.

¹¹⁷*Compare* Williams v. State, 423 N.E.2d 598 (Ind. 1981) (blood alcohol level of .37 alone was insufficient evidence of criminal recklessness) with Carter v. State, 424 N.E.2d 1047 (Ind. Ct. App. 1981) (evidence of intoxication combined with excessive speed and weaving off both sides of the road was sufficient evidence of reckless homicide); Salrin v. State, 419 N.E.2d 1351 (Ind. Ct. App. 1982) (.36 blood alcohol level plus crossing center line twice sufficient evidence of reckless driving).

¹¹⁸See *supra* note 17 and accompanying text.

¹¹⁹Act of Feb. 24, 1984, Pub. L. No. 185-1984, § 3, 1984 Ind. Act 1501, 1503 (codified at IND. CODE § 35-46-1-12 (Supp. 1984)). The statute provides, in part, "[a] person who recklessly, knowingly, or intentionally exerts unauthorized use of the personal services of the property of: (1) an endangered adult . . . for one's own profit or advantage, or for the profit or advantage of another, commits exploitation of . . . [an] endangered adult, a Class A misdemeanor." IND. CODE § 35-46-1-12 (Supp. 1984).

¹²⁰Act of Feb. 24, 1984, Pub. L. No. 185-1984, § 1, 1984 Ind. Acts 1501, 1502 (codified at IND. CODE § 35-42-2-1(2)(E) (Supp. 1984)).

five years of age or older.¹²¹ Finally, persons who are aware of adult abuse are now required to report that fact.¹²²

It was in this year of heightened awareness of the problem of adult abuse that the first case of adult neglect was decided. *Bean v. State*¹²³ was based on a "very sordid story"¹²⁴ of the abuse and neglect of an adult incompetent that resulted in her death. One defendant, Judy Bean, was the victim's legal guardian. She was eventually convicted of voluntary manslaughter and neglect and received consecutive sentences of twenty years and four years. The other defendant was her husband, Raymond Bean. Although Raymond Bean was not a legal guardian of the victim, he was convicted of involuntary manslaughter and neglect and received consecutive sentences of eight and four years. Both of the defendants were prosecuted for neglect of a dependent.¹²⁵ The defendant husband contended that he could not be prosecuted for neglect because, unlike his wife, he was not an appointed legal guardian of the victim. The supreme court, however, emphasized that the neglect statute

clearly provides that one who has the *care, custody, or control* of a dependent may be held liable for acts that constitute neglect of a dependent. . . . There is no requirement in [Indiana Code section] 35-46-1-4 that the person charged with the crime be the legal guardian or natural parent of the child or incompetent adult.¹²⁶

According to the court, it was clear that the husband knew that the victim was a dependent and that both he and his wife were concerned with the care, custody, and control of the victim. Indeed, the court found that the husband at times exerted "abusive control" over the victim, and that his neglect was not merely passive.¹²⁷ Alternatively, the court found that the defendant could also have been convicted of neglect as his wife's accomplice.¹²⁸

¹²¹Act of Feb. 24, 1984, Pub. L. No. 181-1984, § 1, 1984 Ind. Acts 1489 (codified at IND. CODE § 35-38-1-7 (a)(4) (Supp. 1984)).

¹²²Act of Feb. 24, 1984, Pub. L. No. 185-1984, § 4, 1984 Ind. Acts 1501, 1503 (codified at IND. CODE § 35-46-1-13 (Supp. 1984)).

¹²³460 N.E.2d 936 (Ind. 1984).

¹²⁴*Id.* at 938.

¹²⁵*Id.* The charges were brought under IND. CODE § 35-46-1-4, punishing neglect of a dependent. A "dependent" is defined as "a person of any age who is mentally or physically disabled." IND. CODE § 35-46-1-1 (1982). The "endangered adult" provisions, see *supra* note 17, were not in effect at the time, and it is not clear that the victim would have fit that definition because her age was not reported.

¹²⁶460 N.E.2d at 942.

¹²⁷*Id.*

¹²⁸*Id.* Another important holding in *Bean* was that the husband could be convicted and sentenced for both involuntary manslaughter and neglect. *Id.* at 944. In *Smith v. State*, 408 N.E.2d 614 (Ind. Ct. App. 1980), the Indiana Court of Appeals held that a

Thus, the *Bean* decision clearly indicates that a neglect prosecution may be brought against an accused who is not the parent or legal guardian of the victim. The terms “care, custody, or control” are to be interpreted according to the facts of the particular case, not solely by reference to the legal relationship between the victim and the accused. This is important for family abuse situations like that revealed in *Bean*, also for mental institutions, nursing homes, or other institutions that are entrusted with the care, custody, or control of dependents.

7. *Robbery*.—In *Simmons v. State*,¹²⁹ the court of appeals affirmed the defendant’s robbery conviction.¹³⁰ The facts revealed that the defendant entered a liquor store, approached the manager and demanded money. As the defendant ordered the manager, to open the register, he put his hand to a bulge at his waist. The manager thought he saw the outline of a revolver under the defendant’s shirt. The manager handed over the money and the defendant left the store with \$295.¹³¹

The defendant was charged with robbery by threatening the use of force, rather than with robbery by putting the victim in fear.¹³² On appeal, the defendant argued that the evidence was insufficient to show that he threatened the use of force. The court of appeals, however, held that the appearance of having a gun, as observed by the robbery victim, was sufficient to prove “threatening the use of force,” regardless of whether the victim was actually put in fear.¹³³ The court said, “‘threatening the use of force’ . . . can be measured objectively without having to gauge the victim’s reaction,”¹³⁴ while “putting in fear” is considered subjectively by looking at the reaction of the victim. In other words, one may rob a hero as well as a coward by threatening the use of force. If a person does not threaten or use force of any kind, but simply takes a victim’s property by causing fear in an unduly timid victim, he has committed a different form of robbery. Finally, if the robber meets

defendant could not be convicted of both manslaughter and neglect where one act of neglect was the underlying crime for both the neglect and manslaughter charges. The supreme court in *Bean* distinguished *Smith* on the ground that the neglect conviction in *Bean* could have been founded on a series of acts that spanned a period of three years, while the manslaughter conviction could have been based on the acts during the last two weeks of the victim’s life which led to her death. 460 N.E.2d 942-43.

¹²⁹455 N.E.2d 1143 (Ind. Ct. App. 1983).

¹³⁰*Id.* at 1148. The defendant was charged under IND. CODE § 35-42-5-1 (1982) which provides in part: “A person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery, a Class C felony.” *Id.*

¹³¹455 N.E.2d at 1144.

¹³²See IND. CODE § 35-42-5-1.

¹³³455 N.E.2d at 1148.

¹³⁴*Id.*

a person with no fear in his heart, and the robber takes his property by force or threat of force, he has again committed a robbery. Force and fear are generally considered alternatives. "[I]f there is force, there need be no fear, and *vice versa*."¹³⁵ From an objective viewpoint, a person attempting to steal money who reaches toward a bulge under his shirt at his waist can be seen as threatening the use of force. From a subjective standpoint, a victim might be in fear because of such actions. Under either theory, *Simmons* illustrates that a defendant need not actually display a weapon to threaten force or create fear, nor is it necessary that the threat to use force be spoken.

8. *Theft*.—The law of theft developed significantly during the survey period. One major decision resulted from an investigation into the practices of vehicle transmission repair shops in Marion County. *Harwei, Inc. v. State*¹³⁶ contains an illuminating discussion of the crime of theft by creating a false impression. In that case, a prosecutor's employee drove a car to a transmission shop and described the car's mechanical problems to the defendant. Despite the fact that the car was in certifiably good condition, with only one defective gear purposefully placed in the transmission, the defendant stated that the car's clutches and some transmission gears were ruined. They were replaced at a cost of \$194. Two weeks later, a police officer drove a car that was in the same condition to the same shop, where the defendant told him that the transmission was beyond repair. The defendants installed a rebuilt transmission and converter for \$502. Both drivers knew their cars' mechanical defects could have been remedied by replacing a gear without removing the transmission.¹³⁷ The defendants were charged with two counts of theft by creating a false impression.¹³⁸

On appeal, the defendants argued that there was insufficient evidence to sustain their theft convictions because the victims in this case knew what was wrong with their transmission, so that a false impression was not created in their minds. The court of appeals agreed, and said that

¹³⁵W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 94, at 698 (1972) (footnote omitted) [hereinafter cited as LAFAVE & SCOTT].

¹³⁶459 N.E.2d 52 (Ind. Ct. App. 1984).

¹³⁷*Id.* at 54-55.

¹³⁸*Id.* at 55. Theft by creating a false impression is prohibited by IND. CODE § 35-43-4-2 (1982). "Creating a false impression" is contained in the definition of an unauthorized exercise of control over another's property. IND. CODE § 35-43-1(b)(4) (1982).

The first set of charges against the defendants alleged that they exerted unauthorized control over the property of the victim by knowingly creating a false impression that the transmissions needed to be replaced when in fact they did not. The second set of similar charges alleged they stated that the defendants knowingly created a false impression when they told the victims that the transmissions had to be completely rebuilt, when they did not. 459 N.E.2d at 55.

if the victim knew the representation was false the crime was not committed.¹³⁹ Nevertheless, the court of appeals stated that it is not necessary to show that the intended victim was actually defrauded in order to sustain a conviction for attempting to obtain property by false pretenses.¹⁴⁰ Because the evidence clearly established the defendants' guilt of attempted theft, the court of appeals refused to reverse the convictions and, instead, ordered modification of the judgments to reflect convictions for attempted theft.¹⁴¹

The court of appeals correctly stated the traditional rules that a victim of theft by false pretenses must be actually deceived,¹⁴² and that the offense of attempted theft by false pretenses may be present even though the victim is not deceived.¹⁴³ The case operates as a reminder to prosecutors to carefully select the charge filed and reminds courts that juries should be instructed on the law of attempt and reliance by the victim under facts similar to *Harwei*. The penal consequences of the distinction between theft and attempted theft are nonexistent, however, because an attempt is punished with the same penalty as the completed crime.¹⁴⁴

*State v. McGraw*¹⁴⁵ was another significant theft case decided in the last year. The defendant, a computer operator for the city of Indianapolis, used a computer leased by the city to conduct his private business. After the city discharged the defendant, he made a printout of the extensive business data contained in the city's computer and then erased it from the computer's memory. McGraw was convicted on two counts of theft for unauthorized use of computer services. Prior to sentencing, the defendant renewed his motion to dismiss on the ground that the charge failed to state an offense. The trial court sustained the motion.¹⁴⁶

On appeal, the defendant contended that because the theft statute was divided into a conduct section and an intent section, the prohibited

¹³⁹459 N.E.2d at 57.

¹⁴⁰*Id.*

¹⁴¹*Id.* at 58. In a very similar case brought under a similar theft statute, the Kentucky Supreme Court held that reliance by the victim was an essential element of theft. *Brown v. Commonwealth* 656 S.W.2d 727 (Ky. 1983). In that case, the repair shop installed a transmission of dubious value rather than repairing it as represented. The Kentucky court held this second misrepresentation was sufficient to sustain a conviction. 656 S.W.2d at 728. A three-memeber concurrence stated that reliance should no longer be an element of theft: "It is the state of mind of the criminal, not the victim, which the statute denounces." *Id.* (Gant, Leibson, & Wintersheimer, JJ., concurring).

¹⁴²See LAFAVE & SCOTT, *supra* note 135, at 659-60 (1979); R. PERKINS, *CRIMINAL LAW* 308-09 (2d ed. 1969).

¹⁴³LAFAVE & SCOTT, *supra* note 135, at 659-60 (1979).

¹⁴⁴IND. CODE § 35-41-5-1(a) (1982).

¹⁴⁵459 N.E.2d 61 (Ind. Ct. App. 1984).

¹⁴⁶*Id.* at 62-63.

"unauthorized control" could only be exercised over the property itself and not over the "use" of that property. The defendant claimed that the definition of "exert control over property" found in the theft statute¹⁴⁷ does not include the term "use." He argued that the term "services" contained in the statutory definition of property¹⁴⁸ was limited to labor, and that he could not deprive the city of the "use" of the computer unless his data caused an overload on the computer memory banks, or unless he used the computer for his private business at a time when he interfered with city's use.

The Indiana Court of Appeals concluded that the defendant's unauthorized use of another's computer for his own private business was theft and reversed the trial court's order of dismissal.¹⁴⁹ *McGraw* appears to be the only decision in the United States to declare the unauthorized use of computer time to be theft under a general theft statute. Other jurisdictions have held that the actual stealing of computer programs is theft.¹⁵⁰ Courts from two other states have found that the unauthorized use of computer time was not a criminal offense, but these decisions were based on much more narrowly written statutes.¹⁵¹ The *McGraw* court discussed Indiana's theft statute in the computer use context:

Computer services, leased or owned, are a part of our market economy in huge dollar amounts. Like cable television, computer services are ". . . anything of value" [sic]. Computer time is "services" for which money is paid. Such services may reasonably be regarded as valuable assets to the beneficiary. Thus, computer services are property within the meaning of the definition of property subject to theft. When a person "obtains" or "takes" those services, he has exerted control under [Indiana Code section] 34-43-4-1(a). Taking without the other person's consent is

¹⁴⁷IND. CODE § 35-43-4-1(a) (1982) provides, "As used in this chapter, 'exert control over property' means to obtain, take, carry, drive, lead away, conceal, abandon, sell, convey, encumber, or possess property, or to secure, transfer, or extend a right to property."

¹⁴⁸IND. CODE § 35-41-1-2 (1982) (codified as amended at IND. CODE § 35-41-1-23 (Supp. 1984)).

¹⁴⁹459 N.E.2d at 65.

¹⁵⁰*See, e.g.,* National Sur. Corp. v. Applied Sys., Inc., 418 So. 2d 847 (Ala. 1982); *Hancock v. State*, 402 S.W.2d 906 (Tex. Crim. App. 1966).

¹⁵¹*See* *People v. Weg*, 113 Misc. 2d 1017, 450 N.Y.S.2d 957 (N.Y. City Crim. Ct. 1982) (computer failed to qualify as business, commercial, or industrial equipment under theft statute); *Lund v. Commonwealth*, 217 Va. 688, 232 S.E.2d 745 (1977) (computer time not included within phrase "goods and chattels" in larceny statute). Some states have recently enacted specific computer theft or computer trespass statutes. *See* IDAHO CODE § 18-2201 (1984); KY. REV. STAT. §§ 434.840 to -.860 (1984); OKLA. STAT. tit. 21, §§ 1951 to -1956 (Supp. 1984); VA. CODE §§ 18.2-152.1 to -152.14 (Supp. 1984).

unauthorized taking. [Indiana Code section] 35-43-4-1(b)(1). Depriving the other person of any part of the services' use completes the offense. [Indiana Code section] 35-43-4-2(a).¹⁵²

The Indiana legislature significantly augmented theft law when it enacted the offense of committing fraud on a financial institution.¹⁵³ This law prohibits one from obtaining bank property by false pretenses. The principal reason behind the legislation was probably to ensure that the practice of check kiting would be a punishable criminal offense.¹⁵⁴ A

¹⁵²459 N.E.2d at 65. The court said:

Property must be shown to have a value, however slight, but the monetary value of property is of no concern, and the jury may under proper instructions infer some value. . . . The theft statute comprehends a broad field of conduct . . . and does not limit the means or methods by which unauthorized control of property may be obtained. . . . We disagree that specific prohibition to exerting control is necessary to support the conviction theft. . . . Further, we disagree that it is a defense to exerting unauthorized control that the owner was not using the property at the time.

Id. (citations omitted).

¹⁵³Act of Mar. 1, 1984, Pub. L. No. 187-1984, § 1, 1984 Ind. Acts 1504 (codified at IND. CODE § 35-43-5-8 (Supp. 1984)). The new law provides:

(a) A person who knowingly executes, or attempts to execute, a scheme or artifice:

- (1) To defraud a state or federally insured financial institution; or
- (2) To obtain any of the money, funds, credits, assets, securities, or other property owned by or under the custody or control of a state or federally chartered or federally insured financial institution by means of false or fraudulent pretenses, representations, or promises;

commits a Class C felony.

(b) As used in this section, the term "state or federally chartered or federally insured financial institution" means:

- (1) a bank with deposits insured by the Federal Deposit Insurance Corporation;
- (2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;
- (3) a credit union with accounts insured by the National Credit Union Administration Board;
- (4) a federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal Home Loan Bank System; or
- (5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States or of the state.

IND. CODE § 35-43-5-8 (Supp. 1984).

¹⁵⁴The practice of check kiting was described best in *Baskerville v. State*, 23 Md. App. 439, 327 A.2d 918, (1974):

typical check kiting scheme could have been successfully prosecuted under prior Indiana laws. For example, under the general theft statute, a check kiter would be knowingly or intentionally exerting "control over property of another person, with intent to deprive the other person of any part of its value or use."¹⁵⁵ The "other person" would be the bank involved. The "property" would be either "money," an "extension of credit," or simply "a gain or advantage or anything that might reasonably be regarded as such by the beneficiary."¹⁵⁶ The control over the property would be "unauthorized" because the check kiter would either be "creating or confirming a false impression in the other person" or "promising performance that the person knows will not be performed."¹⁵⁷ Similarly, kiting activities could be punished under the check deception statute.¹⁵⁸ The practical problem encountered under both statutes, however, is the ten-day notice provision. Under the theft statute, no crime is committed if a person who writes an insufficient funds check pays the bank the amount due, plus protest fees, within ten days after receiving notice that the check has not been paid.¹⁵⁹ Under the check deception statute, it is a defense if the check is paid within ten days.¹⁶⁰ If a check kiter received notice that his scheme has fallen through, he would quite likely

Assume that a defendant, or his confederate, has an account at Bank A with only a nominal balance. On Monday, a check is written to the defendant in the amount of \$100. The defendant immediately walks to Bank B, where he has an account and is known as a reliable customer, and cashes the check for \$100. The check now in the hands of Bank B does not, of course, clear on that particular day and the defendant has created for himself \$100 out of nothing. To keep the scheme afloat, a second check is drawn on Bank A on Tuesday. It then is cashed at Bank B and the cash is, in turn, redeposited at Bank A. The deposit covers the check written on Monday, which is just now clearing. Tuesday's check has not yet been covered. The scheme is repeated on Wednesday Thursday and Friday. At the end of the week, five \$100 checks, totaling \$500, have been written on Bank A. The five checks have been cashed at Bank B for \$500. Four hundred dollars has been redeposited at Bank A to keep the scheme afloat. The remaining \$100 is the profit of the "kiting" operation.

Id. at 440, 327 A.2d at 919-20.

See also *Denby v. State*, 654 S.W.2d 457 (Tex. Crim. App. 1983); *Phillips v. State*, 604 S.W.2d 904 (Tex. Crim. App. 1979); *State v. Copening*, 103 Wis. 2d 564, 309 N.W.2d 850 (1981).

¹⁵⁵IND. CODE § 35-43-4-2 (1982).

¹⁵⁶IND. CODE § 35-41-1-23(a)(1) (Supp. 1984).

¹⁵⁷IND. CODE § 35-43-4-1(b)(4), (6) (1982).

¹⁵⁸IND. CODE § 35-43-5-5 (1982). See also *Borton v. State*, 230 Ind. 679, 106 N.E.2d 392 (1952); *Huffman v. State*, 205 Ind. 75, 195 N.E. 131 (1933).

¹⁵⁹IND. CODE § 35-43-4-5(b) (1982).

¹⁶⁰IND. CODE § 35-43-5-5 (1982). See *Suits v. State*, 451 N.E.2d 375 (Ind. Ct. App. 1983) (payment was absolute defense; state must prove notice of dishonor of check was sent).

flee the jurisdiction or he would pay the amount due on his checks and claim either that no crime was committed or that he had an absolute defense. Apparently, the legislature intended to protect persons who inadvertently overdrew their account, not check kitters, by adopting the ten-day notice provisions. The ten-day notice statutes, however, would create a problem in any check kiting prosecution under the theft or check deception statutes.

Under the new defrauding a financial institution law, there is no ten-day notice provision.¹⁶¹ Instead, the statute returns to the crime of false pretenses. Thus, it is appropriate to examine how the act of check kiting will be prosecuted as a false pretense under the new statute. The essential elements of the crime of false pretenses are: (1) making a false representation of a past or existing fact; (2) with intent to defraud; and (3) with knowledge of its falsity; (4) to obtain any chattel, money, or valuable security from another; (5) who relies on the false representation; (6) to his detriment.¹⁶² Most of these elements are present in a check kiting scheme: The check kiter knowingly makes a false representation as to a past or existing fact, that there are funds in the account of the drawee bank to cover the check; the banks rely upon the false representation when they part with their money or "credit." The remaining elements are more difficult to prove. The check kiter would argue that there was no detriment to the second bank used because the money was on a deposit in the first bank in time for the early checks in the scheme to clear. Until the last check bounces, the check kiter could contend that there has been no detriment. Yet, according to the common law of false pretenses, it is enough of a detriment that the second bank exposed itself to a hazard that it would not have assumed but for the reliance.¹⁶³

The second element which may present difficulties of proof is that of intent to defraud. The check kiter may claim that although he made an unearned profit from his original false representation, each succeeding representation was for the noble purpose of reimbursing the bank for his original false representation. This argument's fallacy is that the check kiter receives an intended benefit from the later transactions that cover his earlier criminality. The check kiter may also claim that he had no intent to defraud because the scheme was merely an attempt to borrow money, that there was no intent to steal and that he intended to pay

¹⁶¹IND. CODE § 35-43-5-8 (Supp. 1984).

¹⁶²*Baskerville v. State*, 23 Md. App. 439, 440, 327 A.2d 918, 920 (1974). The Indiana Court of Appeals interpreted the general theft statute in terms of traditional false pretenses law in *Harwei v. State*, 459 N.E.2d at 52. See *supra* notes 136-43 and accompanying text.

¹⁶³*Baskerville v. State*, 23 Md. App. 439, 443, 327 A.2d 918, 921 (1974).

back every cent.¹⁶⁴ To defeat this argument, the new defrauding financial institutions statute does not require an intent to *permanently* deprive the victim of his property.

B. Criminal Procedure

1. *Arrest, Search, and Seizure.*—*a. Detentions for Obtaining Identifying Physical Evidence.*—One of the most significant developments in the state's law of arrest, search, and seizure came in the area of detention for the limited purpose of obtaining identifying physical evidence, such as a photograph or fingerprints. In *Baker v. State*,¹⁶⁵ the Indiana Supreme Court held that the defendant's fourth amendment rights were not violated when he was detained on a warrant issued for the sole purpose of obtaining fingerprints and a photograph of him. Consequently, testimony regarding a victim's photographic identification of the defendant was held to have been properly admitted.¹⁶⁶

As part of an investigation of multiple rapes, one victim viewed photographs of possible suspects. She tentatively identified the defendant as her assailant from a poor quality photograph and told police she could make a more positive identification from a clearer photograph. Another witness said the same. Acting upon this information, a police officer presented a probable cause affidavit to a judge, "requesting an arrest warrant be issued for [the defendant] 'pursuant to *Davis v. Mississippi*.'" ¹⁶⁷ The affidavit recited the facts surrounding the rape, the victim's description of her assailant, the fact that she had chosen the defendant's photograph but could not be sure due to the photograph's poor quality, and the fact that another witness was similarly unable to make a positive identification. The court found probable cause and issued an arrest warrant for the sole purpose of fingerprinting and photographing the defendant.¹⁶⁸ The warrant directed that the suspect be released immediately after the identification evidence was gathered. The police complied with the warrant's restrictions. Three rape victims positively identified the defendant from a photographic display containing

¹⁶⁴*Id.* at 445, 327 A.2d at 922.

¹⁶⁵449 N.E.2d 1085 (Ind. 1983).

¹⁶⁶*Id.* at 1090.

¹⁶⁷*Id.* at 1089 (citing *Davis v. Mississippi* 394 U.S. 721 (1969)).

¹⁶⁸The arrest warrant was issued upon the court's finding of "sufficient and probable cause under *Davis v. Mississippi*" 449 N.E.2d at 1089 (quoting the trial court) presented an unfortunate choice of words when used with reference to *Davis*. The significance of *Davis* was the Supreme Court's suggestion, in dictum, that the fourth amendment could be complied with on less than traditional probable cause when certain identification evidence was sought. 394 U.S. 721, 728. Apparently, the Indiana court meant the warrant it issued was based on some quantum of probable cause less than that for the traditional probable cause for arrest.

the defendant's new photograph.¹⁶⁹ The Indiana Supreme Court said that the probable cause affidavit was sufficient to support the warrant and held that "the procedure used to procure appellant's photograph for identification purposes did not violate the Fourth Amendment."¹⁷⁰

Several months later, the Indiana Supreme Court decided *Spikes v. State*,¹⁷¹ another multiple-victim rape case. Within a two day period, two women who were raped in the same area. Both victims provided descriptions to the police. One of the women, who was also robbed, reported that her assailant had opened a cookie jar in her home before he fled. Latent fingerprints were taken from the jar. Local police officers were told of the recent rapes and given a description of the suspect. Later, an Officer Tuttle saw the defendant, noticed his resemblance to the description of the rapist, and detained but did not formally arrest Spikes.¹⁷² The sixteen-year-old defendant agreed to go to the police station where he was fingerprinted.¹⁷³ His fingerprints matched the latent prints taken from the cookie jar of the first victim. After the match was made, the defendant was arrested.

On appeal, the defendant argued that the trial court did not have jurisdiction over him because he was not properly arrested under Indiana Code section 31-6-4-4(b).¹⁷⁴ The State stipulated that Officer Tuttle did not have probable cause to arrest Spikes. The supreme court characterized the defendant's initial detention of the defendant as a stop rather than an arrest, and stated that a police officer did not need to have probable cause to arrest in order to make an investigatory stop. "[H]e need only be in possession of facts sufficient to warrant a man of reasonable caution to believe investigation appropriate."¹⁷⁵ The court found that Officer Tuttle had sufficient facts to warrant an investigatory detention. The majority said that fingerprinting during the investigatory stop was neither an unreasonable search and seizure nor a violation of the privilege

¹⁶⁹449 N.E.2d at 1089.

¹⁷⁰*Id.* at 1090.

¹⁷¹460 N.E.2d 954 (Ind. 1984).

¹⁷²*Id.* at 955-56.

¹⁷³Additional facts provided in Justice DeBruler's concurring opinion indicate that the defendant's consent to be fingerprinted was less than wholly voluntary: "Appellant testified that he was told that he would not be permitted to leave until he provided his prints. The detective testified that if appellant had attempted to leave at that time he would have been stopped." 460 N.E.2d at 959. (DeBruler, J., concurring).

¹⁷⁴*Id.* at 956. IND. CODE § 31-6-4-4(b) (1982) provides: "A child may be taken into custody by any law enforcement officer acting with probable cause to believe that the child has committed a delinquent act." *Id.* The defendant argued that the juvenile court lacked jurisdiction to waive him to criminal court and, consequently, that criminal court did not have jurisdiction to enter judgment. *Id.*

¹⁷⁵460 N.E.2d at 956 (citation omitted).

against self-incrimination.¹⁷⁶ Spikes was not arrested until his fingerprints matched the latent prints, at which point the police had probable cause.

In *Spikes* and *Baker*, the Indiana Supreme Court attempted to describe the circumstances in which a detention, based on less than traditional probable cause and conducted for the sole purpose of obtaining identifying physical evidence, can occur without violating the fourth amendment. The possibility of such a constitutionally permissible detention was suggested by dicta in *Davis v. Mississippi*.¹⁷⁷ In *Baker*, the

¹⁷⁶*Id.* The majority cited *Jones v. State*, 267 Ind. 205, 369 N.E.2d 418 (1977), for its statement that "fingerprinting is a jail house procedure which does not violate a defendant's Fifth Amendment right against self-incrimination and does not constitute an unreasonable search and seizure of evidence from the defendant." 460 N.E.2d at 956. *Jones*, however, is of questionable applicability because it involved fingerprinting done after the defendant's arrest. In *Spikes*, the fingerprinting preceded the arrest.

In his separate concurrence, Justice DeBruler analyzed the case in two stages. The first stage, which occurred when Spikes was stopped on the street, was evaluated in light of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Davis v. Mississippi*, 394 U.S. 721 (1969). Justice DeBruler found the investigatory stop proper under *Terry* and unlike the dragnet stop in *Davis*. Because the stop was lawful and because Spikes voluntarily consented to be transported to the police station interrogation room, Justice DeBruler found that there was no constitutional violation at this stage. 460 N.E.2d at 959 (DeBruler, J., concurring). In the second stage of his analysis, Justice DeBruler found that Spikes' detention for fingerprinting was constitutional based on the rule in *United States v. Dionisio*, 410 U.S. 1 (1973). 460 N.E.2d at 960 (DeBruler, J., concurring). *Dionisio*, however, did not address the issue of detentions for procurement of identification evidence. Instead, *Dionisio* involved a grand jury subpoena and an order to provide a voice exemplar. In Justice DeBruler's analysis, the police order for fingerprints in *Spikes* was treated as equivalent to the grand jury order in *Dionisio*. 460 N.E.2d at 960. (DeBruler, J., concurring). There are important differences between those procedures. First, the grand jury subpoena was subject to judicial review. Second, the target witness in *Dionisio* was lawfully present under the subpoena when the order for a voice exemplar was issued. His presence was not the result of a seizure under the fourth amendment. 410 U.S. at 9. In contrast, Spikes' presence at the police station was brought about by a seizure in the fourth amendment sense. Spikes was told he could not leave police custody until he provided his fingerprints, yet there was no probable cause to hold him under traditional probable cause to arrest standards. 460 N.E.2d at 959-60 (DeBruler, J., concurring). Spikes' detention would have been unlawful at that point, unless it could have been justified under a lesser probable cause standard like that recognized in *Baker v. State*, 449 N.E.2d 1085 (Ind. 1983). The rationale suggested by Justice DeBruler would have been more persuasive if the second stage had been based on *Baker*.

¹⁷⁷394 U.S. 721, 721 (1969). The Court stated: "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." *Id.* at 728. This dictum in *Davis* has generated considerable activity in state courts and legislatures. The leading case in the United States on the issue is *Wise v. Murphy*, 275 A.2d 205 (D.C. 1971), in which the government obtained a lineup order from a judge even though there was insufficient probable cause to arrest. The American Law Institute advocated legislation authorizing the issuance of identification orders for suspects in the

detention for photographing was based on an arrest warrant supported by less than probable cause. In *Spikes*, the detention for fingerprinting was based solely on the direction of an officer at the police station; probable cause did not exist.

It is not clear from the opinion in *Baker* whether the court simply held that there was probable cause to arrest, photograph, and fingerprint Baker, or whether it was applying a more liberal standard for an investigative detention to obtain physical evidence. The court's subsequent decision in *Spikes* did not even mention *Baker*. Nonetheless, in *Spikes* the State stipulated that there was insufficient probable cause to arrest the defendant. This developing area of state law, then, must await later decisions which should fully develop clear guidelines for evaluating detentions for gathering identification evidence.

b. Plain View Doctrine.—Two Indiana cases analyzed the plain view doctrine during the survey period. The first, *Manning v. State*,¹⁷⁸ was decided by the third district court of appeals. In *Manning*, a police officer went to a salvage yard to return the defendant's personal property. While he was there, the officer noticed an unlicensed, 1979 maroon Oldsmobile parked on the property. The officer was suspicious that the car was stolen. He shined his flashlight on the vehicle identification number imbedded in the dashboard and recorded the number. Later, the officer checked the identification number by computer and determined that the Oldsmobile had been stolen. He obtained a search warrant to search the salvage yard for the Oldsmobile. During the search, police officers entered a storage shed near where the Oldsmobile had been

Model Code of Pre-Arrest Procedure. In essence, the Model Code permits a magistrate to issue an order compelling a suspect to provide identification evidence if: (1) there is reasonable cause to believe that an offense has been committed; (2) there are reasonable grounds to suspect that the subject of the order has committed the offense and it is reasonable to subject him to an identification order in view of the seriousness of the offense; (3) the results will be of material aid in determining whether or not the suspect committed the offense; and (4) the evidence cannot be otherwise practicably obtained. MODEL CODE OF PRE-ARREST PROCEDURE § 170.2(6) (1975). "Reasonable grounds" is used by the Model Code to define the standard for a stop, *id.* § 110.2, so it is clear that detentions for obtaining physical evidence were intended to be ordered on less than probable cause. *Id.* § 170.2, note at 102-03.

Where no statutes or court rules have been adopted, some courts have been reluctant to hold that a court may order detention of a suspect to obtain physical evidence on less than probable cause. See, e.g., *People v. Marshall*, 69 Mich. App. 288, 244 N.W.2d 451 (1976); *In re Abe A.*, 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982); *In re Armed Robbery, Albertson's*, 99 Wash. 2d 106, 659 P.2d 1092 (1983). The New Jersey Supreme Court recently held that courts, as an inherent power within their constitutional authority governing searches and seizures, had authority to issue a detention order for identification evidence. See *State v. Hall*, 93 N.J. 552, 461 A.2d 1155 (1983).

¹⁷⁸*Manning v. State*, 459 N.E.2d 1207 (Ind. Ct. App. 1984), *transfer denied*, June 21, 1984.

seen. The Oldsmobile was not found inside, but police officers checked the license numbers and vehicle identification numbers of the other vehicles in the building, apparently opening the doors and hoods to do so. A computer check revealed that one of these vehicles had been stolen. The search ended and the area was secured. A second search warrant was obtained based upon the information gathered during the first warranted search. This second warrant was generally directed to a search for any stolen vehicles or property. The warrant was executed and various items were seized.¹⁷⁹

The defendant challenged the introduction of the evidence seized. He argued that the evidence should have been excluded because the scope of the search under the first warrant exceeded that warrant, thereby rendering the second warrant invalid because it was based upon information obtained as a result of an excessive search. The defendant challenged the police's reliance on the plain view doctrine to justify the search of the shed after they learned the Oldsmobile was not there. The plain view doctrine has been explained by the Indiana Supreme Court:

"Pursuant to the doctrine, a police officer rightfully occupying a particular location who inadvertently discovers items of readily apparent criminality may properly seize the items; evidence so seized is both admissible as evidence and usable for derivative purposes, for the seizure is not regarded as the product of a search within the meaning of the Fourth Amendment" ¹⁸⁰

It was this explanation of the plain view doctrine that the court of appeals applied, with particular emphasis on the "readily apparent criminality" aspect. The search of vehicles in the storage shed, after it was clear that the Oldsmobile named in the warrant was not in the shed, was not considered a plain view search by the majority. The search of the other vehicles was improper because those vehicles had no connection with any crimes known to the police at the time of the search and because it was not readily apparent that the vehicles were stolen. When the officers opened doors and hoods to search for vehicle identification numbers, "the search was extended into places where the maroon Oldsmobile could not have been found."¹⁸¹ Consequently, the court of appeals held that the officers executing the warrant exceeded the scope of the warrant when they continued their search of the storage shed.¹⁸² The excessive nature of the search was not justified by the plain view doctrine, particularly because officers had to open car doors and hoods to locate the vehicle identification numbers that formed the basis for the second

¹⁷⁹*Id.* at 1209-10.

¹⁸⁰*Id.* at 1211-12 (quoting *Lance v. State*, 425 N.E.2d 77, 78 (Ind. 1981) (citations omitted)).

¹⁸¹459 N.E.2d at 1212.

¹⁸²*Id.*

search. The majority and dissent sharply disagreed on whether it was readily apparent that the other vehicles in the storage shed might have been evidence of a crime, and thus within the plain view doctrine. According to the dissent, when the officers were executing the warrant, it was obvious that they had come upon an illegal "chop shop."¹⁸³ If it were readily apparent that a chop shop operation was uncovered in *Manning*, then the officers should have had the authority to seize the vehicles as evidence of a crime. The dissent also stated that no illegal search occurred when the police recorded vehicle identification and license numbers because those identifying characteristics "are in plain view on all autos for the purpose of aiding identification."¹⁸⁴ The dissent ignored the majority's observation that the police opened doors and hoods to obtain the vehicle identification numbers.

The different statements of facts presented by the majority and dissent are crucial in explaining their different outcomes. If, as the dissent asserted, the police officers only observed vehicle identification numbers on a dashboard through the windshield or wrote down license numbers, such activity should be upheld under the plain view doctrine. If, as the majority stated, the police officers opened car doors and hoods to search for identification numbers, the plain view doctrine was inapplicable and the admissibility of the results must be justified on a different theory. It could be argued that such a search should be upheld because there is no expectation of privacy in a vehicle identification number,¹⁸⁵ or that police should be permitted to search for the identification number under a lesser standard than probable cause, such as reasonable suspicion.¹⁸⁶ The facts in *Manning* indicated that the police officers could have met this lesser standard. Nevertheless, as written, the majority did not satisfactorily explain why dashboard-imbedded vehicle identification numbers or license plate numbers were illegally seized by the police. It implied that the officers should not have examined

¹⁸³*Id.* at 1214 (Hoffman, J., concurring in part and dissenting in part). The dissent's description of the facts differed significantly from that of the majority: "Once inside [the shed], they [police officers] observed late model automobiles in various degrees of dismantlement. Cutting torches had been used to 'chop' cars that appeared too new and undamaged to be in a salvage yard. The locks on several vehicles had been punched out, and steering columns were mysteriously dismantled." *Id.*

¹⁸⁴*Id.* at 1215.

¹⁸⁵See W. LAFAVE, *Search and Seizure* § 2.5(d) (1978) (citing *United States v. Polk*, 433 F.2d 644 (5th Cir. 1970)). If there is a lesser expectation of privacy in vehicle identification numbers, that limited expectation would be further lessened in an auto salvage yard. See *Bionic Auto Parts & Sales, Inc. v. Fahner*, 721 F.2d 1072 (7th Cir. 1983) (upheld administrative inspection warrants for the search of auto salvage yards). See also IND. CODE § 9-1-3.6-14 (Supp. 1984).

¹⁸⁶See 1 W. LAFAVE, *supra* note 185, at § 2.5(d) (citing *United States v. Powers*, 439 F.2d 373 (4th Cir. 1971); *State v. Colon*, 6 Conn. Cir. Ct. 722, 316 A.2d 797 (1973); *Commonwealth v. Navarro*, 2 Mass. App. Dec. 214, 310 N.E.2d 372 (1974)).

what was in plain view before them once the particular car sought was not found.

The plain view doctrine was also the focus of the Indiana Supreme Court in *McReynolds v. State*.¹⁸⁷ In this case, police obtained a warrant to search the defendant's home. The only item listed in the warrant was the sawed-off barrel of a double-barrel shotgun that had been used to kill two persons and injure three others. In the course of his search, a police officer looked inside a cabinet large enough to conceal the gun barrel. Inside the cabinet, the officer discovered marijuana seeds in a clear plastic bag and seized the marijuana. The defendant argued that the marijuana was improperly discovered and should have been suppressed.¹⁸⁸

There are three basic requirements for a search and seizure based on the plain view doctrine: (1) the officer must first make a lawful intrusion or lawfully be in a place where he can observe the evidence; (2) the officer must discover the evidence inadvertently; and (3) it must be immediately apparent that the items the officer observes are evidence of a crime, contraband, or otherwise subject to seizure.¹⁸⁹ In *McReynolds*, the first requirement was met because the officers were on the premises pursuant to a valid search warrant. The officer who looked in the cabinet was properly doing so since it was in a place where the shotgun barrel might have been hidden. Second, the discovery of the marijuana was inadvertent because the police did not know in advance that the marijuana was there.

In determining whether or not the third requirement had been satisfied, the court discussed whether the evidence inadvertently discovered in plain view must be connected in some way to the crime which gave rise to the initial intrusion.¹⁹⁰ If this were true, the marijuana would be suppressed because it was not related to the murders or the shotgun. The Indiana Supreme Court refused to place such a restriction on the plain view doctrine, and instead stated that the item seized need only be evidence of *a* crime, not evidence of *the* crime which gave rise to the search.¹⁹¹ In this case, the officer testified at the suppression hearing that he knew the item was marijuana. Because the evidentiary value of the item seized was immediately apparent, the third requirement of the plain view doctrine was met. After *McReynolds*, it is clear that police need not ignore evidence of criminal activity that is in plain view simply because it is unrelated to the crime that gave rise to the police investigation.

¹⁸⁷460 N.E.2d 960 (Ind. 1984).

¹⁸⁸*Id.* at 962.

¹⁸⁹*Id.* (citing *Texas v. Brown*, 103 S. Ct. 1535, 1540 (1983)).

¹⁹⁰460 N.E.2d at 963.

¹⁹¹*Id.*

c. Probable Cause Affidavits.—The Indiana Supreme Court explained the use of probable cause affidavits in *Baker v. State*.¹⁹² In that case, the defendant claimed an arrest warrant was defective because it was based on a probable cause affidavit that did not expressly state that the witnesses quoted therein spoke with personal knowledge and because the affidavit was not incorporated into the warrant.

First, the supreme court held that the failure to incorporate the affidavit into the warrant was not a fatal defect when the warrant alone was sufficiently specific as to its object and scope.¹⁹³ By statute, the form of the warrant requires a description of the place to be searched and the property that is the subject of the search.¹⁹⁴ Because there was no lack of specificity and no prohibited discretion vested in the police, the court concluded that the warrant was not totally defective.¹⁹⁵

Second, the supreme court stated that because the probable cause affidavit was sufficient to support the warrant, it was reasonable to assume that the witnesses quoted therein were speaking about facts within their knowledge. The court said the defendant mistakenly relied on *Madden v. State*,¹⁹⁶ a decision based on a search warrant statute that had been amended twice since that case. After *Baker*, it appears that *Madden* has finally been laid to rest.

During the survey period, the Indiana General Assembly again amended the arrest and search warrant statute to expand the potential bases for a finding of probable cause.¹⁹⁷ Previously, the law required that when probable cause is based on hearsay, the supporting affidavit must “contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished.”¹⁹⁸ After the 1984 amendments, the law provides:

When based on hearsay, the affidavit must either:

(1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or

(2) contain information that establishes that the totality of the circumstances corroborates the hearsay.¹⁹⁹

¹⁹²449 N.E.2d 1085 (Ind. 1983). See *supra* text accompanying notes 165-69.

¹⁹³449 N.E.2d at 1090.

¹⁹⁴IND. CODE § 35-33-5-3 (1982).

¹⁹⁵449 N.E.2d at 1090.

¹⁹⁶263 Ind. 223, 328 N.E.2d 727 (1975).

¹⁹⁷Act of Feb. 24, 1984, Pub. L. No. 177-1984, 1984 Ind. Acts 1478 (codified at IND. CODE § 35-33-5-2 (Supp. 1984)).

¹⁹⁸IND. CODE § 35-33-5-2 (1982).

¹⁹⁹IND. CODE § 35-33-5-2 (Supp. 1984).

Previously, the Indiana law codified the *Aguilar-Spinelli* two-pronged approach to demonstrating probable cause.²⁰⁰ The *Aguilar-Spinelli* test was significantly modified by the United States Supreme Court in *Illinois v. Gates*.²⁰¹ The new Indiana law reflects this modification. It presents alternative approaches to demonstrating probable cause when based on hearsay. The first is still the *Aguilar-Spinelli* test, and the second is the totality of the circumstances approach of *Gates*.

2. *Pretrial Issues.—a. Grand Juries.*—Under Indiana grand jury procedure, a target witness has the right to an attorney, including an appointed attorney.²⁰² Before this year, however, there had been no statutory or recognized constitutional right²⁰³ to have counsel present with the witness in the grand jury room. The common practice has been for counsel to remain outside the grand jury room to consult with the witness if the witness has a question. This year the General Assembly amended the grand jury statutes to provide that a target witness may be assisted by an attorney in the grand jury room.²⁰⁴ The new statute provides:

(a) A target subpoenaed under section 5[35-34-2-5] of this chapter is entitled to the assistance of his attorney when the person is questioned in the grand jury room, subject to this section.

(b) The target's attorney:

(1) must take an oath of secrecy administered by the foreman;

(2) while in the grand jury room may not, without first obtaining the consent of the prosecutor and the foreman:

(A) address the grand jury or the prosecuting attorney;

(B) make objections or arguments;

(C) question any person; or

(D) otherwise participate in the proceedings; and

(3) may advise the client so long as the conversation is not overheard by any member of the grand jury.

(c) The court that impaneled the grand jury may remove any attorney from the grand jury room and may find him to be in contempt of court if the attorney has violated the requirements of subsection (b) or has otherwise disrupted or unnecessarily delayed the grand jury proceeding.²⁰⁵

²⁰⁰The two-pronged test takes its name from *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964).

²⁰¹103 S. Ct. 2317 (1983), *reh'g denied*, 104 S. Ct. 33 (1983).

²⁰²IND. CODE § 35-34-2-5 (1982).

²⁰³*United States v. Mandujano*, 425 U.S. 564 (1976).

²⁰⁴Act of Mar. 8, 1984, Pub. L. No. 170-1984, § 3, 1984 Ind. Acts 1391 (codified at IND. CODE § 35-34-2-5.5 (Supp. 1984)).

²⁰⁵IND. CODE § 35-34-2-5.5 (Supp. 1984).

Prosecutors operating under the new statute have reported that attorneys for target witnesses have been actively involved in the proceedings. If the attorney for the witness asks permission to ask questions, the grand jury foreman will usually agree and the prosecuting attorney often will not want to disagree with the foreman.²⁰⁶ Therefore, as a practical matter, the attorney for a target witness may have a significant role in grand jury proceedings.

The Indiana Supreme Court also had an occasion to rule on the constitutionality of the grand jury witness immunity statutes. In *In re Caito*,²⁰⁷ the defendant was subpoenaed before a grand jury as a target witness. Upon his attorney's advice, Caito refused to testify after being sworn, except to identify himself. He claimed his answers might tend to incriminate him. The State moved to grant Caito use immunity under Indiana Code section 35-34-2-8,²⁰⁸ and requested that he answer a list of written questions. The court granted use and derivative use immunity and ordered Caito to answer questions. When he again asserted his privilege against self-incrimination, Caito was found in contempt.²⁰⁹

The defendant challenged the constitutionality of the witness immunity statutes as applied to target witnesses. The court said the immunity statute would be upheld as constitutional if it were found to be coextensive with the privilege against self-incrimination.²¹⁰ The court reviewed the various forms of immunity:

Three types of immunity may be granted a witness in exchange for his testimony: (1) *transactional immunity*: which prohibits the State from criminally prosecuting the witness for any transaction concerning that to which the witness testifies; (2) *use immunity*: where the testimony compelled of the witness may not be used at a subsequent criminal proceeding; and (3) *derivative use immunity*: whereby any evidence obtained as a result of the witness' compelled testimony may not be admitted against him in a subsequent criminal prosecution.²¹¹

The court explained that transactional immunity is constitutional because the witness granted it receives the same protection as if he had never testified. Contrarily, use immunity alone is not coextensive with fifth amendment protections because the compelled testimony may still be employed by investigators to obtain other incriminating evidence. The Indiana statute combines use and derivative use immunity, and as such

²⁰⁶This scenario is derived from the author's conversations with Indiana prosecuting attorneys since the statute became effective.

²⁰⁷459 N.E.2d 1179 (Ind. 1984).

²⁰⁸IND. CODE § 35-34-2-8 (1982).

²⁰⁹459 N.E.2d at 1181.

²¹⁰*Id.* at 1182 (citing *Kastigar v. United States*, 406 U.S. 441 (1972)).

²¹¹459 N.E.2d at 1182-83 (citations omitted).

provides immunity that is coextensive to the privilege against self incrimination, according to the Indiana Supreme Court.²¹²

b. Change of Judge.—In 1984, the Indiana legislature attempted to reinstate the right to an automatic change of judge.²¹³ Activity on the part of the Indiana Supreme Court, however, indicates that the legislature's attempt has failed. In *State ex rel. Gaston v. Gibson Circuit Court*,²¹⁴ the supreme court found that a previous legislative effort to restore the right to an automatic change of judge was in conflict with Criminal Rule 12.²¹⁵ Because the statute was construed to be procedural in nature and in conflict with Criminal Rule 12, the court held that Criminal Rule 12 controlled and the statute was declared a nullity.²¹⁶

Shortly after *Gaston*, an original action challenging the 1984 version of the change of judge statute came before the supreme court in *State ex rel. Jeffries v. Lawrence Circuit Court*.²¹⁷ The court, following *Gaston*, once again found the legislative enactment in conflict with Criminal Rule 12 and held that Criminal Rule 12 controlled changes of judge. There remains no right to an automatic change of judge.

Another decision concerning changes of judge was decided by the court of appeals in *Hobbs v. State*.²¹⁸ In that case the defendant contended that he was denied a fair trial because the prosecutor always has the right to a change of judge by virtue of his authority to select the court

²¹²*Id.* at 1184. The court quoted the United States Supreme Court in *Kastigar v. United States*, 406 U.S. 441, 460 (1972), which suggested that to protect against prosecutorial abuses, the State should have the burden of showing that subsequent evidence introduced is not tainted by the immunity. The State can avoid the taint by establishing that the evidence has an independent, legitimate source. The prosecution's duty to prove that the evidence it proposes is derived from a legitimate source is an affirmative duty. 459 N.E.2d at 1184.

²¹³Act of Mar. 8, 1984, Pub. L. No. 170-1984, § 4, 1984 Ind. Acts 1392 (codified at IND. CODE § 35-36-5-1 (Supp. 1984)). The statute provides:

In any criminal action, either the defendant or the state is entitled as a substantive right to a preemptory change of venue from the judge without specifically stating the reason. The defendant or the state may obtain a change of judge under this section by motion filed in a manner and within the time limitations as specified in the Indiana Rules of Criminal Procedure. Each party is entitled to only one (1) change of judge under this section.

IND. CODE § 35-36-5-1 (Supp. 1984).

²¹⁴462 N.E.2d 1049 (1984).

²¹⁵*Id.* at 1050-51. The statute at issue provided: "In any criminal action, either the state or the defendant is entitled as a substantive right to a change of venue from the judge upon the same grounds and in the same manner as a change of venue from the judge is allowed in civil actions." IND. CODE § 35-36-6-1(c) (Burns Supp. 1983) (repealed 1984).

²¹⁶462 N.E.2d at 1051.

²¹⁷*State ex. rel. Jeffries v. Lawrence Circuit Court*, 467 N.E.2d 741 (Ind. 1984).

²¹⁸451 N.E.2d 356 (Ind. Ct. App. 1983).

in which to file charges. He argued that due process required courts with criminal jurisdiction to assign cases on a “blind draw” method rather than permitting the prosecutor to file charges in the court of his choice. The court of appeals refused to hold that such a filing system was constitutionally required.²¹⁹

3. *Guilty Pleas and Post-Conviction Relief.—a. Statutory Changes.—*

A number of developments occurred in the area of guilty pleas, particularly the legislature’s amendments to the guilty plea statutes. The guilty plea advisement statute was amended to provide:

(a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first *determining that* the defendant:

- (1) understands the nature of the charge against him;
- (2) *has been informed* that by his plea he waives his rights to:
 - (A) a public and speedy trial by jury;
 - (B) confront and cross-examine the witnesses against him;
 - (C) have compulsory process for obtaining witnesses in his favor; and

(D) require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself;

(3) *has been informed* of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences; and

(4) *has been informed that if:*

(A) *there is a plea agreement as defined by section 1 of this chapter; and*

(B) *the court accepts the plea;*

the court is bound by the terms of the plea agreement.

(b) A defendant in a misdemeanor case may waive the rights under subsection (a) by signing a written waiver.

(c) *Any variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty.*²²⁰

Two important changes are contained in this statute. Under the prior statute, a judge accepting a plea could not accept the plea without first “addressing” the defendant and “informing him” of those certain specified rights the defendant waived by entering a plea of guilty and the

²¹⁹*Id.* at 359-60.

²²⁰Act of Feb. 29, 1984, Pub. L. No. 179-1984, §1, 1984 Ind. Acts 1486, (ccdifed at IND. CODE § 35-35-1-2 (Supp. 1984)) (additions to statutory language appear in italics).

potential range of sentences he might receive.²²¹ Based on the previous statute, the Indiana Supreme Court held that trial judges must personally inform defendants of all these facts and that the advisement could come from no other source.²²² Generally, the focus was not on whether or not the defendant understood the rights he was waiving but on whether the judge advised him of those rights. The new law no longer requires that the judge personally advise the defendant, only that the judge not accept a guilty plea without first "determining that" the defendant "has been informed" of the constitutional rights he is waiving and the consequences of his plea.²²³ Under this new statute, it is possible that a written advisement of rights in a felony case entered in the record at a guilty plea proceeding may suffice as an advisement to the defendant.

Another significant provision added by the statute is a harmless error clause.²²⁴ Under this clause, any variance from the statutorily required advisements which does not violate the defendant's constitutional rights is not a basis for setting aside a guilty plea. This concept was derived from a recent amendment to the Federal Rules of Criminal Procedure.²²⁵ Recent decisions of the Indiana courts, however, have declared this subsection to be a nullity since the failure of a judge to inform an accused of facts necessary for him to make a voluntary and informed judgment whether or not to plead guilty cannot be considered harmless error.²²⁶ Additionally, the Indiana Supreme Court has ruled that the harmless error section violates the constitutional doctrine of separation of powers.²²⁷

²²¹IND. CODE § 35-325-1-2 (1982).

²²²*Early v. States*, 442 N.E.2d 1071 (Ind. 1982); *German V. State*, 428 N.E.2d 234 (Ind. 1981). See also Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 152 (1984).

²²³IND. CODE § 35-35-1-3 was similarly amended: "(a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the plea is voluntary. The court shall determine whether any promises, force, or threats were used to obtain the plea." IND. CODE § 35-35-1-3(a) (Supp. 1984).

²²⁴IND. CODE § 35-35-1-2(c) (Supp. 1984).

²²⁵Under the federal rules, the harmless error provision contained in the rule governing pleas states: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 11(h).

²²⁶*Austin v. State*, 468 N.E.2d 1027 (Ind. 1984); *Jones v. State*, 467 N.E.2d 757 (Ind. Ct. App. 1984).

²²⁷*Austin v. State*, 468 N.E.2d 1027 (Ind. 1984). The court explained, "Under the separation of powers doctrine of our state constitution, the legislature may not fetter the judiciary with its concept of harmless error." *Id.* at 1029. Interestingly, the legislature's concept of harmless error codified at IND. CODE § 35-35-1-2(c) is not inconsistent with the court's own general harmless error rule. The court's harmless error rule, however, encompasses "substantial rights," clearly broader than the constitutional rights contemplated by the legislature. See IND. R. TR. P. 61 (made applicable to criminal cases by IND. R. CRIM. P. 21).

The Indiana General Assembly also enacted a statute governing the imposition of penalties following a grant of post-conviction relief.²²⁸ Indiana Code section 35-50-2-1 provides:

If:

(1) prosecution is initiated against a petitioner who has successfully sought relief under any proceeding for postconviction remedy and a conviction is subsequently obtained; or

(2) a sentence has been set aside under a postconviction remedy and the successful petitioner is to be resentenced;

the sentencing court may impose a more severe penalty than that originally imposed, and the court shall give credit for time served.²²⁹

This statute appears to be no more than a codification of the federal constitutional rules developed in *North Carolina v. Pearce*²³⁰ and *Chaffin v. Stynchcombe*.²³¹ As a matter of state law, however, a problem exists because this new statute is in conflict with the Indiana Supreme Court's rules for post-conviction remedies. Post-Conviction Rule 1, section 10 states:

(a) If prosecution is initiated against a petitioner who has successfully sought relief under this Rule and a conviction is subsequently obtained, or

(b) if a sentence has been set aside pursuant to this Rule and the successful petitioner is to be resentenced,
then the sentencing court shall not impose a more severe penalty than that originally imposed, and the court shall give credit for time served.²³²

The supreme court has applied this rule to prohibit a court from imposing a higher sentence on a defendant than he originally received on his guilty plea if his guilty plea is vacated as a result of post-conviction relief.²³³ Therefore, at least as to guilty pleas vacated through post-conviction relief, there appears to be a conflict between the new statute and the supreme court's post-conviction relief rules. Where there is a direct conflict between a supreme court rule and a legislative enactment, one must determine whether the statute is procedural or substantive. If it

²²⁸Act of Feb. 29, 1984, Pub. L. No. 179-1984, § 3, 1984 Ind. Acts 1487 (codified at IND. CODE § 35-50-1-5 (Supp. 1984)).

²²⁹IND. CODE § 35-50-1-5 (Supp. 1984).

²³⁰395 U.S. 711 (1969). *Pearce* would limit the statute to higher sentences based upon objective information concerning conduct by the defendant which became known to the judge after the original sentencing hearing. *Id.* at 726.

²³¹412 U.S. 17 (1973).

²³²IND. R. POST-CONVICT. REM. § 10.

²³³*Ballard v. State*, 262 Ind. 482, 318 N.E.2d 798 (1974).

is procedural, the supreme court rule will control over the statute.²³⁴ The supreme court undoubtedly will be called upon to resolve this apparent conflict between the new enactment and the post-conviction rules.

One question presented to trial courts shortly after the new statutes became effective was whether or not the statutes could be applied retroactively to guilty pleas entered before the effective date.²³⁵ The obvious thrust of the statute was directed not only at guilty pleas entered after the effective date, but also at appellate review of guilty pleas entered before that date. Nonetheless, recent decisions have refused to give the statutes retroactive application.²³⁶

b. Alford Pleas.—During the survey period, the Indiana Supreme Court explained Indiana law regarding *Alford* pleas, those guilty pleas entered while the defendant simultaneously maintains his innocence.²³⁷ The state supreme court appeared to adopt the *Alford* rule wholeheartedly in *Boles v. State*.²³⁸ Yet in *Ross v. State*,²³⁹ the supreme court declared: "We hold, as a matter of law, that a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error."²⁴⁰ *Ross* did not present a classic *Alford* plea issue, however, because the defendant did not originally enter a guilty plea. He was tried and convicted of armed robbery, rape, and of being a habitual criminal. At trial, the State offered the defendant a plea bargain agreement in open court and in the presence of his counsel. The plea agreement was rejected by the defendant's counsel; the defendant registered no complaint with the result. After his conviction, the defendant filed a petition for post-conviction relief, alleging ineffective assistance of counsel. *Ross* contended that only he and not his lawyer could have accepted or rejected the plea agreement, and that his lawyer failed to satisfy the defendant's desire to accept the agreement while maintaining his innocence.²⁴¹

The Indiana Supreme Court rejected both of the defendant's contentions, and explained that *Alford* and *Boles* were not on point. The

²³⁴State ex rel. Gaston v. Gibson Circuit Court, 462 N.E.2d 1049 (Ind. 1984); State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972).

²³⁵IND. CODE § 35-35-1-2 (Supp. 1984) (effective Feb. 29, 1984); IND. CODE § 35-50-1-5 (Supp. 1984) (effective Feb. 29, 1984).

²³⁶Austin v. State, 468 N.E.2d 1027 (Ind. 1984); Davis v. State, 464 N.E.2d 926 (Ind. Ct. App. 1984).

²³⁷The name of the plea is derived from North Carolina v. Alford, 400 U.S. 25 (1970), in which the Supreme Court held that it was not an error to accept a guilty plea from a defendant who simultaneously maintained his innocence when there was a strong factual showing that the defendant committed the crime.

²³⁸261 Ind. 354, 303 N.E.2d 645 (1973).

²³⁹456 N.E.2d 420 (Ind. 1983).

²⁴⁰*Id.* at 423.

²⁴¹*Id.* at 421.

court used *Ross* as an opportunity to clarify Indiana law on the acceptance of guilty pleas. First, the court observed that *Boles* did not involve a guilty plea entered over protestations of innocence, so the *Boles* court's reliance on *Alford* was only dictum. Second, the court noted that *Alford* did not create a mandatory requirement for a court to accept a guilty plea under *Alford*-like circumstances.²⁴² Third, the court held that, as a matter of law, in Indiana, a judge may not accept a guilty plea accompanied by a defendant's claim of innocence.²⁴³

Unfortunately, the supreme court's holding raises more unanswered questions. This confusion could be attributed to the fact that the court reached to answer a question not squarely before it. Because the defendant did not actually enter a guilty plea, the State had no occasion to establish a "factual basis" to demonstrate that the defendant committed the crime. *Ross* did not answer whether or not the judge can accept a guilty plea accompanied by the defendant's protestations of innocence if the State establishes by overwhelming evidence that the defendant committed the crime. In his concurring opinion, Justice DeBruler attempted to limit the holding to the entry of guilty pleas when the defendant claims his innocence "unaccompanied by evidence showing a factual basis for guilt."²⁴⁴ *Ross* also failed to explain what constitutes a "protestation of innocence." It is unclear, for example, whether a defendant who simply states he was too drunk at the time of the crime to remember whether he committed it has registered a protest of innocence. It is also unclear whether the trial court can, nonetheless, accept his guilty plea if the State establishes a factual basis for the plea. Courts that have considered this issue have held that the plea can be accepted.²⁴⁵ A related question is presented by the defendant who claims he acted in self-defense and yet pleads guilty to a lesser offense: Can the judge still accept the plea? The Indiana Court of Appeals has held that the court could accept the plea where the defendant admitted the crime and related its material facts.²⁴⁶

In summary, *Ross* is consistent with past Indiana cases and the United States Supreme Court's decision in *Alford* if it held that a trial judge has no discretion to accept a guilty plea when the defendant protests his innocence and there has been no factual basis established to demonstrate that the defendant committed the crime. But if *Ross*

²⁴²*Id.* at 423.

²⁴³*Id.*

²⁴⁴*Id.* at 425 (DeBruler, J., concurring). Justice DeBruler suggested that trial courts follow the statutory scheme found at IND. CODE § 35-35-1-3(b) (1982). 456 N.E.2d at 425 (DeBruler, J., concurring).

²⁴⁵*Anderson v. State*, 396 N.E.2d 960, (Ind. Ct. App. 1979); *Pearson v. State*, 308 Minn. 287, 241 N.W.2d 490 (1976).

²⁴⁶*Brown v. State*, 421 N.E.2d 431 (Ind. Ct. App. 1981).

held that a guilty plea can never be accepted when the defendant claims his innocence, even when there is a factual basis for the plea, it is a marked departure from precedent.²⁴⁷

c. Advising the Defendant.—1. Public and Speedy Jury Trial.—Indiana courts have generally been very strict in requiring that the record of a guilty plea reflect that the judge personally advised the defendant of the rights he was waiving by entry of the plea.²⁴⁸ Nevertheless, the judge is not required to advise the defendant of those rights in any prescribed words or particular litany.²⁴⁹ Several decisions during the survey period approved of a judge's advice to a defendant concerning his waiver of public and speedy trial rights even though the advice given in several cases was an imperfect explanation of the defendant's rights.

The leading case in the area was *Garringer v. State*,²⁵⁰ in which the trial judge carefully explained to the defendant the rights he was waiving without mentioning the words "public" and "speedy" when discussing the right to a jury trial. The court explained that the right to a jury trial meant that twelve people of the county would determine the defendant's guilt or innocence. The court also explained that other people would be present during the trial, including witnesses who could be called to testify. The Indiana Supreme Court held that the judge's explanation of a jury trial was sufficient to advise the defendant that his trial was public. The supreme court also held that the omission of the word "speedy" was not grounds to vacate the plea because the defendant "clearly knew how speedy his trial was to be since he acknowledged at the hearing that he knew it was set to begin two days later."²⁵¹

There is a subtle but critical distinction between these two holdings by the supreme court. Regarding advice as to a public trial, the court focused on what the judge told the defendant. There can be few complaints with the judge's advice on this point. Regarding the speedy trial advisement, however, the court focused on what the defendant actually knew about his speedy trial rights and not on the advice of the judge. Therefore, at least as to the advisement of speedy trial rights, the supreme

²⁴⁷See *Neeley v. State*, 457 N.E.2d 532 (Ind. 1983); *Johnson v. State*, 457 N.E.2d 196 (Ind. 1983); *Lowe v. State*, 455 N.E.2d 1126 (Ind. 1983) (cases describing what constitutes a sufficient basis on which to accept a guilty plea).

²⁴⁸See *Early v. State*, 442 N.E.2d 1071 (Ind. 1982); *German v. State*, 428 N.E.2d 234 (Ind. 1981). See also *Johnson, Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 152 (1984).

²⁴⁹*McCann v. State*, 446 N.E.2d 1293 (Ind. 1983); *Laird v. State*, 270 Ind. 323, 385 N.E.2d 452 (1979).

²⁵⁰455 N.E.2d 335 (Ind. 1983).

²⁵¹*Id.* at 339.

court indicated its willingness to look beyond the words uttered by the advising judge to determine whether or not the defendant was sufficiently cognizant of his right.²⁵²

In *Lowe v. State*,²⁵³ the supreme court again found that an accused was adequately advised of his right to a "public" trial. In *Lowe* the judge explained the defendant's right to a trial by jury with twelve of his peers, his right to subpoena witnesses in his behalf, and his right to cross-examine those witnesses against him.²⁵⁴

The Indiana Court of Appeals soon began to follow *Garringer*. In *Seybold v. State*,²⁵⁵ the advising judge did not utter the words "public" and "speedy." Relying on *Garringer*, the appellate court found the advice as to a public trial sufficient when the defendant was advised of his right to present his own witnesses and to cross-examine those against him. The trial judge's reference to a trial date that was only three weeks away was held sufficient to advise the defendant of his right to a speedy trial.²⁵⁶ The court of appeals also affirmed a guilty plea in *Gresham v. State*,²⁵⁷ in which the trial court did not specifically advise the defendant of his speedy trial rights. The defendant asked twice for a speedy trial, had it granted each time, and pleaded guilty only four days before his trial date. Additionally, the trial court advised the defendant of the nature and composition of the jury and of his right to call and cross-examine witnesses. The court of appeals held that this was sufficient to advise the defendant of his right to a "public" trial.²⁵⁸

2. *Proof Beyond A Reasonable Doubt.*—The latitude permitted in advising a defendant of his public and speedy trial rights is sharply contrasted by the strict requirements of advising a defendant of his waiver of the right to have the State prove his guilt beyond a reasonable doubt. Two Indiana Court of Appeals decisions illustrate the contrast. In *Beahan v. State*,²⁵⁹ the trial court failed to specifically advise the defendant, at the time she entered her plea, of her right to have the State prove her guilt beyond a reasonable doubt. The defendant had been present throughout voir dire and preliminary instructions when the State's burden of proof was explained to the jury. Nonetheless, because

²⁵²See also *Johnson v. State*, 457 N.E.2d 196 (Ind. 1983); *Mathis v. State*, 273 Ind. 609, 406 N.E.2d 1182 (1980).

²⁵³455 N.E.2d 1126 (Ind. 1983).

²⁵⁴*Id.* at 1130.

²⁵⁵456 N.E.2d 1076 (Ind. Ct. App. 1983).

²⁵⁶*Id.* at 1079.

²⁵⁷459 N.E.2d 66 (Ind. Ct. App. 1984).

²⁵⁸*Id.* at 68.

²⁵⁹449 N.E.2d 1183 (Ind. Ct. App. 1983).

the trial court did not directly advise the defendant of this right, the guilty plea was vacated by the court of appeals.²⁶⁰ In a concurring opinion, Judge Hoffman acknowledged that the holding was a correct application of Indiana precedent, but added that the guilty plea statute went beyond state or federal constitutional requirements and emphasized that the Indiana Supreme Court required strict compliance with its terms.²⁶¹ He concluded that "the next session of the Indiana General Assembly should look at this statute."²⁶²

The appellate court was confronted again with the issue in *Joshua v. State*.²⁶³ The defendant, Joshua, and his codefendant were to be tried jointly. A jury was impaneled and preliminary instructions were read in Joshua's presence. The State's burden of proof, the presumption of innocence, and the meaning of reasonable doubt were explained to the jury. The day after the trial began, the defendants entered guilty pleas. Joshua observed his codefendant enter a guilty plea after the trial court carefully advised the codefendant that the State had to prove his guilt beyond a reasonable doubt. When Joshua's turn came to enter his plea, the judge failed to advise him of the reasonable doubt standard. The court of appeals reluctantly reversed the conviction and criticized "present case law [that] requires the ritualistic invocation of these rights *at the time the plea is entered*"²⁶⁴

3. *That the Court Is Not Bound By Plea Agreements.*—A multitude of post-conviction relief petitions are filed each year challenging the sufficiency of advisements by trial courts. One might inquire why lower court judges do not simply devise a checklist of required advisements and strictly follow them. This suggestion has much to recommend it, but the difficulty in developing an adequate checklist is easily underestimated. *Early v. State*²⁶⁵ illustrates the confusion inherent in advisements. The defendant entered his guilty plea on May 4, 1979. The guilty plea advisement statute in effect at that time required the judge to inform a defendant "that the court is not a party to any agreement which may have been made between the prosecutor and the defense and is not bound thereby."²⁶⁶ At the same time, Indiana law provided that if a court accepted a guilty plea recommendation, the court was bound by

²⁶⁰*Id.* at 1184.

²⁶¹*Id.* (Hoffman, J., concurring) (citing *German v. State*, 428 N.E.2d 234 (Ind. 1981)).

²⁶²449 N.E.2d at 1184.

²⁶³452 N.E.2d 463 (Ind. Ct. App. 1983), *transfer denied*, Dec. 19, 1983.

²⁶⁴*Id.* at 465.

²⁶⁵454 N.E.2d 416 (Ind. 1983).

²⁶⁶IND. CODE § 35-4.1-1-3(e) (1976) (repealed 1982). For provisions effective after Sept. 1, 1982, see IND. CODE § 35-35-1-2 (1982).

the terms of that recommendation.²⁶⁷ Therefore, when the defendant's guilty plea was entered, Indiana had two statutes in apparent conflict.²⁶⁸ In view of the plea agreement statute, it might appear to some trial judges that it would be wrong to tell a defendant that the court was not bound by the terms of the plea agreement. Yet in *Early*, the trial judge who accepted the plea agreement and sentenced the defendant according to its terms was reversed because he did not advise the defendant that the court was not bound by the terms of the plea agreement.²⁶⁹

In a subsequent decision, *Carr v. State*,²⁷⁰ the judge said to the defendant, "'You understand that if you enter a plea of guilty that it will be my duty to impose a sentence and pursuant to the agreement I would impose a sentence of twenty years, you understand that?'"²⁷¹ After the defendant said he understood, the judge accepted the plea and sentenced the defendant to twenty years imprisonment. The trial judge stated to the defendant the fact that the judge would follow the plea agreement and sentence the defendant according to the plea agreement. Once again, the Indiana Supreme Court vacated the guilty plea because the judge did not inform the defendant that the court was not bound by the plea agreement. The results in these cases reveal precisely why the legislature amended the guilty plea statutes.

d. Laches.—As one might surmise, post-conviction petitions challenging guilty pleas have become a strong source of irritation for judges and prosecuting attorneys. This irritation is exacerbated when a defendant who received the benefit of his plea bargain years ago decides today that he was not properly advised of all his rights and files a post-conviction petition challenging his guilty plea. Quite often, it is the possibility of an habitual offender charge that stirs the defendant to action. In recent years, prosecutors have been combatting these post-conviction petitions by asserting the equitable doctrine of laches. Recent decisions of the appellate courts, however, will hamper this use of the doctrine.

²⁶⁷IND. CODE § 35-5-6-2(b) (1976) (recodified at IND. CODE § 35-35-3-3 (1982)). The binding effect of a plea agreement was firmly established by the supreme court in *State ex rel. Goldsmith v. Marion County Superior Court*, 419 N.E.2d 109 (Ind. 1981).

²⁶⁸In 1978, the Indiana Court of Appeals acknowledged the inconsistency and said that because a trial court is bound by a plea agreement under a more recent statute, the court should not inform the defendant that it is not bound by the agreement. *Elmore v. State*, 176 Ind. App. 306, 308, 375 N.E.2d 660, 662 n.3, *rev'd on other grounds*, 269 Ind. 532, 382 N.E.2d 893 (1978). The inconsistency was finally corrected by the legislature. See IND. CODE § 35-35-1-2(4) (1982).

²⁶⁹454 N.E.2d at 417.

²⁷⁰455 N.E.2d 343 (Ind. 1983).

²⁷¹*Id.* at 345 (quoting the Record at 71-73).

Formerly, laches operated as an affirmative defense that, once raised by the State, required the petitioner to explain his delay in filing a petition for post-conviction relief.²⁷² Recently, in *Twyman v. State*,²⁷³ the Indiana Supreme Court modified the established procedure:

The law in Indiana is still that once the State raises the affirmative defense of laches in a post-conviction relief proceeding the petitioner is entitled to an evidentiary hearing upon the issue, before the judge may find laches applies. The burden of proving the defense rests entirely upon the State. The petitioner may prove evidence to negate the State's evidence, but this in no way shifts the onus to the petitioner to disprove laches.²⁷⁴

The State's burden of going forward and raising the laches defense would be accomplished in most cases by the State simply pleading laches and showing the passage of a long period of time. Once the issue is raised, the petitioner for post-conviction relief is entitled to an evidentiary hearing. The burden of proving laches remains on the State, and the petitioner may attempt to rebut the State's evidence. There are three elements of a laches defense: (1) the petitioner's knowledge of existing conditions and his acquiescence in them; (2) unreasonable delay in asserting a right; (3) prejudice to the party asserting laches.²⁷⁵

Before *Twyman*, the burden was on the defendant to show an excuse for an unreasonable delay. After *Twyman*, the State will have to prove the three elements of laches. The first element should be simple for the State to prove: The defendant will know he has been convicted of a crime and, in most cases where laches will be asserted, the defendant will not have taken a previous appeal.²⁷⁶ The second element, unreasonableness of delay, must be decided on a case-by-case basis. The most difficult element for the State to prove may be the element of prejudice. A recent post-*Twyman* case, however, affirmed the State's laches defense where the State demonstrated prejudice by showing that the accomplice who had given a statement to the police which supported probable cause had died, that the sheriff's files pertaining to the case could not be located, and that the deputy sheriff who was the chief investigating officer had no independent recollection of the case.²⁷⁷

4. *Jury Trial—*a. *Waiver of Jury Trial.*—In Indiana, a trial judge is not constitutionally required to explain to a defendant the difference

²⁷²*Stutzman v. State*, 427 N.E.2d 724 (Ind. Ct. App. 1981).

²⁷³459 N.E.2d 705 (Ind. 1984).

²⁷⁴*Id.* at 712. See also *Gregory v. State*, 463 N.E.2d 464 (Ind. 1984).

²⁷⁵*Frazier v. State*, 263 Ind. 614, 617, 335 N.E.2d 623, 624 (1975).

²⁷⁶See, e.g., *Morrison v. State*, 466 N.E.2d 783 (Ind. Ct. App. 1984).

²⁷⁷*Harrington v. State*, 466 N.E.2d 1379 (Ind. Ct. App. 1984). But see *Mottern v. State*, 466 N.E.2d 488 (Ind. Ct. App. 1984).

between a bench trial and a jury trial, nor is the record required to demonstrate that the defendant understands this difference before he can be held to have validly waived his right to a jury trial.²⁷⁸ However, the waiver of a jury trial must be made personally by the defendant; it must be reflected in the record, and must be entered in writing or in open court before the trial begins.²⁷⁹

A variation on these general rules operates for misdemeanor prosecutions, which are governed by a special criminal rule. Criminal Rule 22 provides:

A defendant charged with a misdemeanor may demand a trial by jury by filing a written demand therefor not later than ten (10) days before his scheduled trial date. The failure of a defendant to demand a trial by jury as required by this rule shall constitute a waiver by him of trial by jury unless the defendant has not had at least fifteen (15) days advance notice of his scheduled trial date and of the consequences of his failure to demand a trial by jury.²⁸⁰

The Indiana Court of Appeals construed this rule in *Wilson v. State*.²⁸¹ In that case, the court of appeals reversed the defendant's convictions for driving while intoxicated and unsafe lane movement because the trial court failed to explain to the defendant the consequences of his failure to demand a trial by jury.²⁸² If the charged offenses had been felonies, the waiver of a jury trial would have been governed by the general rules which require the defendant's personal waiver on the record before trial. But because the offenses charged were misdemeanors, Criminal Rule 22 applied. Because the record did not indicate that the defendant had notice of the consequences of his failure to demand a jury trial, the court of appeals reversed and remanded.²⁸³

If Criminal Rule 22 creates an exception to the jury trial waiver rules for felonies, as the court of appeals suggested, then the reason for the exception is clear. By statute, all criminal trials are tried to a jury unless there is a joint waiver by the defendant, the prosecutor, and the judge.²⁸⁴ A jury trial is the norm unless explicitly waived. But in misdemeanor cases, by operation of Criminal Rule 22, all trials are tried to the bench unless there is a timely demand for a jury trial by the

²⁷⁸*Earl v. State*, 450 N.E.2d 49 (Ind. 1983); *Kennedy v. State*, 271 Ind. 382, 393 N.E.2d, 139 (1979), *cert. denied* 444 U.S. 1047 (1980).

²⁷⁹*Good v. State*, 267 Ind. 29, 366 N.E.2d 1169 (1977).

²⁸⁰IND. R. CRIM. P. 22.

²⁸¹453 N.E.2d 340 (Ind. Ct. App. 1983).

²⁸²*Id.* at 341-342.

²⁸³*Id.* at 342.

²⁸⁴IND. CODE § 35-37-1-2 (1982).

defendant. In this context, it is only fair that the trial court advise the defendant at a time sufficiently in advance of the time he must demand a jury trial that he will waive it unless he requests a jury. Criminal Rule 22 does not, however, alter the rule that the trial court need not explain to a defendant the difference between a bench trial and a jury trial.

b. Defenses.—1. Insanity Defense.—The Indiana legislature once again changed state law regarding the insanity defense. In 1978, the General Assembly shifted the burden of proof to the defendant to establish the defense of insanity.²⁸⁵ In 1981, Indiana adopted the plea of guilty but mentally ill.²⁸⁶ This year, the legislature amended the definition of the defense itself.²⁸⁷ The new definition provides:

(a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.

(b) As used in this section, “mental disease or defect” means a severely abnormal mental condition that grossly and demonstrably impairs a person’s perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct.²⁸⁸

This redefinition of the insanity defense statute eliminates that part of the defense which absolved a person of responsibility for his crime if he was unable, by reason of mental disease or defect, to conform his conduct to the requirements of the law. By eliminating the “irresistable impulse” prong of the insanity defense, the legislature determined that a defendant in Indiana will now only be able to prove his insanity by showing that he was unable to appreciate the wrongfulness of the conduct at the time of the offense. Although the amendment strikes the “substantial capacity” language from the statute, the new definition of “mental disease or defect” perhaps serves the same purpose, since the mental disease or defect that affects the ability to appreciate the wrongfulness of the conduct must be a “severely abnormal mental condition that grossly and demonstrably impairs a person’s perception.”²⁸⁹

²⁸⁵Act of Mar. 8, 1978, Pub. L. No. 145, § 9, 1978 Ind. Acts 1326 (codified at IND. CODE § 35-41-4-1 (1982)).

²⁸⁶Act of May 5, 1981, Pub. L. No. 298, § 5, 1981 Ind. Acts 2372 (codified at IND. CODE § 35-36-2-3 to -5 (1982)).

²⁸⁷Act of Feb. 24, 1984, Pub. L. No. 184-1984, 1984 Ind. Acts 1501 (codified at IND. CODE § 35-41-3-6 (Supp. 1984)).

²⁸⁸IND. CODE § 35-41-3-6 (Supp. 1984).

²⁸⁹*Id.*

Another case of procedural significance in the insanity defense area, *Buhring v. State*,²⁹⁰ was decided during the survey period. By statute in Indiana, the State opens and closes the final arguments to the jury in a criminal case.²⁹¹ In *Buhring*, the defense attorneys contended that because they bore the burden of proof on the insanity defense, they should be permitted to open and close final arguments. The Indiana Supreme Court rejected this contention.²⁹²

Indiana's guilty but mentally ill statute survived a constitutional attack in *Stader v. State*.²⁹³ In that case, the defendant argued that the guilty but mentally ill statute²⁹⁴ was unconstitutional as applied to him because he was not receiving any form of treatment or psychiatric therapy after having been found guilty but mentally ill. The court of appeals ruled this was a challenge to the conditions of his detention which could not be asserted on direct appeal. The court said that when inmates challenge the conditions of their custody, the issue must be raised by a writ of mandamus, a writ of prohibition, or a civil rights action.²⁹⁵

2. *Intoxication*.—In *Johnson v. State*,²⁹⁶ the supreme court answered the question of whether or not intoxication is a defense to an *attempt* to commit a crime. Historically, the intoxication defense has been limited to specific intent crimes.²⁹⁷ Attempt has been held to be a specific intent crime.²⁹⁸ Therefore, it would seem obvious that the intoxication defense should apply in attempt cases. The intoxication defense statute provides that "[v]oluntary intoxication is a defense only to the extent that it negates an element of an offense referred to by the phrase 'with intent to' or 'with an intention to.'"²⁹⁹ Confusion resulted because the attempt statute itself contains no such language.³⁰⁰ Nevertheless, in *Johnson*, the supreme court decided that the intoxication defense applies in an attempt case.³⁰¹

c. *Jury Instructions*.—1. *Attempt*.—In *Smith v. State*,³⁰² the Indiana Supreme Court held that it was fundamental error not to instruct the jury that a specific intent is required to prove attempted murder. In

²⁹⁰453 N.E.2d 228 (Ind. 1983).

²⁹¹IND. CODE § 35-37-2-2 (1982).

²⁹²453 N.E.2d at 231.

²⁹³453 N.E.2d 1032 (Ind. Ct. App. 1983).

²⁹⁴IND. CODE § 35-36-2-5 (1982).

²⁹⁵453 N.E.2d at 1036.

²⁹⁶455 N.E.2d 932 (Ind. 1983).

²⁹⁷See *Carter v. State*, 408 N.E.2d 790, 794 (Ind. Ct. App. 1980).

²⁹⁸*Zickefoose v. State*, 270 Ind. 618, 388 N.E.2d 507 (1979).

²⁹⁹IND. CODE § 35-41-3-5(b) (1982).

³⁰⁰IND. CODE § 35-41-5-1 (1982).

³⁰¹455 N.E.2d at 937.

³⁰²459 N.E.2d 355 (Ind. 1984).

Smith, the jury was instructed that for the crime of attempted murder the State must prove beyond a reasonable doubt that the defendant knowingly engaged in conduct which constituted a substantial step toward murder. The defendant raised no objection to this instruction, nor apparently did he tender his own instruction on the intent required for an attempt.³⁰³ The defendant's failure to object would ordinarily be considered a waiver of any error, but a close majority of the supreme court held that the error was fundamental and thus subject to review even though not properly preserved.³⁰⁴

The dissent in *Smith* agreed that the concept of specific intent could have been made clearer to the jury. In addition to the specific instruction on attempted murder, however, the jury was instructed on the definitions of "intentionally" and "knowingly," and instructed that the intent to kill could be inferred from the use of a deadly weapon in a manner likely to cause death. Also, the charging instrument that alleged that the defendant stabbed the victim with the intent to kill was read to the jury. Under these instructions taken as a whole, the dissent believed that the failure to more carefully define the specific intent requirement for attempts could not be considered a fundamental error.³⁰⁵

The court of appeals handed down another decision which demonstrated how careful courts must be when instructing juries on attempt crimes. In *Vandeventer v. State*,³⁰⁶ the defendant was charged with attempted voluntary manslaughter. He was found guilty but mentally ill of attempted reckless homicide. The defendant had tendered an instruction which said that the defendant could be convicted of attempted reckless homicide as an included offense of attempted voluntary manslaughter and this instruction was given by the trial court. Nevertheless, attempted reckless homicide was not an offense under Indiana law because the attempt statute applies only to specific intent crimes. The issue on appeal was whether a conviction of a nonoffense could be permitted to stand on the basis of invited error.³⁰⁷ The State argued that the error was invited by the defendant who tendered the included offense instruction, and that the defendant could not profit from obtaining an erroneous instruction and then claiming the error on appeal.³⁰⁸ The court held,

³⁰³*Id.* at 357.

³⁰⁴*Id.* at 358. Note that *Smith v. State* was a 3:2 decision.

³⁰⁵*Id.* at 363. *Cf.* Blackmon v. State, 455 N.E.2d 586 (Ind. 1983) (failure of jury instructions to inform jurors of specific intent requirement was error waived on appeal, not elevated to fundamental error status).

³⁰⁶459 N.E.2d 1221 (Ind. Ct. App. 1984), *transfer denied*, May 22, 1984.

³⁰⁷*Id.* (citing Stamper v. State, 260 Ind. 211, 294 N.E.2d 609 (1973); Moore v. State, 445 N.E.2d 576 (Ind. Ct. App. 1983)).

³⁰⁸459 N.E.2d at 1222.

however, that the invited error doctrine did not apply when it would result in a conviction for a nonexistent offense.³⁰⁹

2. *Signing Instructions*.—Indiana Code section 35-37-2-2(6) provides that special jury instructions tendered by a party are required to be reduced to writing, numbered, and signed by the party or his attorney.³¹⁰ Previously, the Indiana Supreme Court had held that no claim of error could be predicated on the failure to give an instruction that was not numbered and signed.³¹¹ Recently, in *Harding v. State*,³¹² the defense attorney had numbered the instructions and signed only the cover sheet of the instructions. The supreme court held that this too was insufficient to comply with the statute.³¹³

d. *Replaying of Testimony for Jurors*.—In the past, Indiana courts have held that, upon jury request, the trial court must replay any testimony given in open court or reread any documentary evidence introduced at trial.³¹⁴ Trial courts have discretion to refuse such a jury request,³¹⁵ although this discretion may be limited.³¹⁶ Yet in *Shaffer v. State*,³¹⁷ the Indiana Supreme Court reversed a conviction because the jury was permitted to hear more than three hours of the tape-recorded testimony of witnesses and the defendant. The court distinguished its earlier decisions which seemed to permit the trial court's action, on the basis of the amount of testimony to be replayed, holding that a trial court may not permit a virtual replay of the entire trial especially when there were numerous contradictions in the testimony.³¹⁸

e. *Post-Trial Attacks on Verdicts*.—Two decisions during the survey period discussed post-trial attacks on jury verdicts based upon allegedly improper, extraneous influences on jurors. In *Fox v. State*,³¹⁹ the defendant contended she was denied a fair trial because of the jury's exposure to extraneous prejudicial material. On the morning after the jury reached a midnight verdict of guilty in a robbery trial, the court

³⁰⁹*Id.*

³¹⁰IND. CODE § 35-37-2-2(6) (1982).

³¹¹*Askew v. State*, 439 N.E.2d 1350 (Ind. 1982).

³¹²457 N.E.2d 1098 (Ind. 1984).

³¹³*Id.* at 1101.

³¹⁴*See Harris v. State*, 269 Ind. 672, 382 N.E.2d 913 (1978); *Ortiz v. State*, 265 Ind. 549, 356 N.E.2d 1188 (1976).

³¹⁵*Douglass v. State*, 441 N.E.2d 957 (Ind. 1982); *Smith v. State*, 270 Ind. 579, 388 N.E.2d 484 (1979).

³¹⁶*Ortiz v. State*, 265 Ind. 549, 564-65, 356 N.E.2d 1188, 1197 (1976) (citing American Bar Association, *Standards for Criminal Justice, Trial by Jury*, Commentary at 134-37 (approved draft 1968)).

³¹⁷449 N.E.2d 1074 (Ind. 1983).

³¹⁸*Id.* at 1076.

³¹⁹439 N.E.2d 1385 (Ind. Ct. App. 1982).

bailiff found a *Newsweek* magazine in the jury room. The magazine's cover bore the legend, "The Epidemic of Violent Crime," and was illustrated by a picture of a gloved hand pointing a revolver directly at the viewer. The magazine contained an eight-page feature article on crime. The bailiff's affidavit reciting these facts was attached to the defendant's motion to correct errors. The court of appeals remanded the case to the trial court with instructions to reassemble the jury for a voir dire examination pursuant to the guidelines of *Lindsey v. State*.³²⁰ The supreme court reversed, holding that *Lindsey* did not apply to the post-verdict stage.³²¹

It is not reasonable . . . and would be counterproductive to require the judge, after a verdict has been returned, to run willy-nilly in search of evidence of a prejudicial impropriety upon the mere *claim* of a *possible* impropriety which, if it did in fact, occur, *possibly* harmed the claimant. The *Lindsey* procedures are not appropriate and are not available for attacking a verdict.³²²

The court introduced the guidelines for ruling upon this kind of post-verdict attack: "If, and only if, a claimant establishes, by a preponderance of the evidence, that the jury saw or heard the material complained of, should the judge be put to the task of determining the likelihood of the verdict having, thereby been polluted."³²³ Therefore, a post-verdict claim of jury taint based on exposure to prejudicial extraneous material should allege, as a matter of fact, that exposure occurred. The fact of exposure should be supported by affidavits or, in the trial court's discretion, testimony.³²⁴

The Indiana Court of Appeals addressed a related issue in *Berkman v. State*,³²⁵ that of an improper internal influence on a jury. In that case, the defendant was on trial for dealing in cocaine. On appeal, the defendant alleged that one of the jurors was biased against persons charged with selling drugs and that the juror concealed this bias on voir dire. The defendant supported this allegation by attaching an affidavit of an unselected venireman who said that the challenged juror "expressed a predisposition of guilt towards individuals charged with drug related

³²⁰260 Ind. 351, 295 N.E.2d 819 (1973) (established procedures examining jurors allegedly exposed to prejudicial information during trial).

³²¹457 N.E.2d 1088, 1094 (Ind. 1984).

³²²*Id.* at 1092 (citation omitted). The court stated that applying the *Lindsey* rule after a verdict is reached would lead to jurors impeaching their own verdicts, an outcome contrary to Indiana law. *Id.* (citing *Wilson v. State*, 253 Ind. 585, 255 N.E.2d 817 (1970); *Davis v. State*, 249 Ind. 426, 231 N.E.2d 230 (1967)).

³²³457 N.E.2d at 1093-94.

³²⁴*Id.* at 1093.

³²⁵459 N.E.2d 44 (Ind. Ct. App. 1984), *transfer denied*, May 30, 1984).

offenses.””³²⁶ The trial court denied the defendant’s motion for a new trial without a hearing.

The court of appeals found that the affidavit was insufficient to warrant a new trial or even an evidentiary hearing: “[A] defendant seeking a hearing on juror misconduct must first present some specific, substantial evidence showing a juror was possibly biased,” the court stated.³²⁷ The affidavit in *Berkman* merely stated the prospective juror’s own conclusions that the juror was biased, without stating the facts on which that belief was based.

Thus, both *Fox* and *Berkman* indicate that a defendant challenging a jury verdict based upon some improper influence on the jury, external or internal, must support his claim with very specific affidavits.

³²⁶*Id.* at 45 (quoting the affidavit).

³²⁷*Id.* at 46.

VI. Domestic Relations

STEVEN E. KING*

Survey-period developments in the law of domestic relations again spanned the familial spectrum. Among the case precedent and statutory developments examined herein, particular attention is directed to the analysis contained in Section E concerning the General Assembly's enactment of custodial and rehabilitative maintenance and the discussion included in Section F regarding the enforceability of oral property settlements. Those developments bear everyday if not profound consequences for the family law practitioner.

A. Adoption

1. *The Adoptive Rights of Married Persons and Grandparents.*—

An unusual juxtaposition of factual circumstances in *Browder v. Harmeyer*¹ necessitated survey-period review of the constitutional rights of both married persons and grandparents to adopt. The natural parents of four-year-old Nathaniel Browder divorced in 1980. Following the termination of their parental rights one year later, Nathaniel was placed with paternal grandmother Mary Browder. There he resided for a period of five months, when both the paternal grandparents, Browder, and maternal grandparents, Harmeyer, filed petitions to adopt Nathaniel. Prior to a consolidated hearing on the petitions, Mary Browder's husband, who had separated from her in 1980, withdrew his name from their petition to adopt. Based on Section 1 of the Adoption Act,² which prohibits adoption by a married person whose spouse does not join the petition, Browder's petition was dismissed. Following a hearing on the Harmeyers' petition, they were granted adoption rights. Browder challenged both rulings on appeal.

Browder argued the dismissal of her petition violated equal protection guarantees. Inasmuch as Section 1 permits an unmarried person to adopt as a single parent,³ she maintained that the denial of that same privilege to her based on her married-but-separated status constituted a denial of her equal protection rights and, in turn, impaired her fundamental right

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¹453 N.E.2d 301 (Ind. Ct. App. 1983).

²IND. CODE § 31-3-1-1 (1982).

³*Id.* The statute reads in pertinent part: "Any resident of this state desirous of adopting any person under eighteen (18) years of age . . . may . . . file a petition with the clerk of the court having jurisdiction . . ." (emphasis added).

to marry. Following its extensive analysis of equal protection considerations,⁴ the court of appeals applied the intermediate review standard of *Zablocki v. Redhail*⁵ and concluded the state's interest in placing children in homes free of dissension justified the requirement that spouses join in petitions to adopt. For the majority, Judge Miller also concluded the applicability of the requirement should be unaffected by the fact Browder's husband was estranged: "Although the chances of reconciliation might be remote in this case, there has been no divorce proceeding either, which proceeding in and of itself can cause problems to which an adoptive child, already the victim of one marital misadventure, should not be exposed again."⁶ Accordingly, the best interests of the minor child vindicate the statutory exception.

The court also rejected Browder's due process argument predicated on her in loco parentis relationship to Nathaniel. She maintained the removal of him from her custody without a finding of unfitness violated her fundamental right to family integrity. With due respect for the rights of grandparents, the court refused to apply those strict standards required to justify the removal of a child from the care and custody of natural parents.⁷ Carefully observing that Browder had received notice of the Harmeyers' petition and the evidentiary hearing thereon,⁸ the court concluded the evidence supported the trial court's conclusion that Nathaniel's best interests would be served via his adoption by the maternal grandparents.⁹

2. *Notice: Due Process Rights of Putative Fathers.*—The due process rights of putative fathers to notice of pending adoption proceedings were addressed in *Lehr v. Robertson*,¹⁰ where the United States Supreme Court expanded the principle that a mere biological relationship with a child born out of wedlock is insufficient to warrant constitutional protection. At issue was New York's statutory scheme requiring that notice of adoption proceedings be supplied to putative fathers of various cir-

⁴453 N.E.2d at 305-06.

⁵434 U.S. 374 (1978). See also *Indiana High School Athletic Ass'n v. Raike*, 164 Ind. App. 169, 329 N.E.2d 66 (1975).

⁶453 N.E.2d at 307 (citations omitted).

⁷A presumption exists that the best interests of the minor child are served if he remains in the care and custody of a natural parent. That presumption may be rebutted by evidence establishing either: 1) the unfitness of the parent; 2) prolonged acquiescence of the parenting role; or 3) the parent's voluntary relinquishment of his responsibilities to the extent the affections of the child and third party are so interwoven that severance would seriously endanger the happiness of the child. *Kissinger v. Shoemaker*, 425 N.E.2d 208 (Ind. Ct. App. 1981). A petition to terminate parental rights, of course, requires proof of a "clear and convincing" nature. *Santosky v. Kramer*, 455 U.S. 745 (1982); see also, Act of Feb. 29, 1984, Pub. L. No. 131-1984, 1984 Ind. Acts 1176 (codified at IND. CODE § 31-6-7-13 (Supp. 1984)).

⁸453 N.E.2d at 309.

⁹*Id.* at 309-10.

¹⁰103 S. Ct. 2985 (1983).

cumstance,¹¹ including those whose names were filed in the state-maintained “putative father registry.”¹² Conceding he satisfied none of the statutory criteria entitling him to notice, putative father Lehr asserted that “special circumstances gave him a constitutional right to notice and a hearing before Jessica [his alleged daughter] was adopted.”¹³ Those special circumstances included his filing of a petition to establish paternity of Jessica in the Westchester County Court one month after the natural mother and her husband had initiated adoption proceedings in Ulster County Court. Procedural confusion culminated in the granting of the adoption petition without a hearing.¹⁴ Lehr’s challenges to the Ulster court’s decision were rejected by New York’s appellate courts,¹⁵ and the United States Supreme Court accepted jurisdiction to address concomitant contentions: 1) whether due process required Lehr be given notice and opportunity to be heard before he was deprived of his potential relationship with Jessica, and 2) whether the gender-based classifications of New York’s adoption procedure violated the equal protection clause. On similar bases, both arguments were rejected.

Drawing upon its prior decisions concerning illegitimate children and the rights of biological fathers,¹⁶ the Court focused its constitutional analysis on the “clear distinction between a mere biological relationship and an actual relationship of parental responsibility.”¹⁷ Only where the putative father acts on the biological link and assumes some significant role in the daily responsibilities of the child’s upbringing is constitutional protection accorded the putative father’s interest in the relationship. Consequently, the Court reduced Lehr’s due process challenge to the question whether New York’s statutory scheme “adequately protected

¹¹*Id.* at 2988. The classes of fathers entitled to notice included: 1) those whose paternity had been formally established by court order; 2) those identified as the father on birth certificates; 3) those who had openly resided with the natural mother and child; 4) those identified as the father in a sworn statement of the natural mother; and 5) those married to the child’s mother prior to the child’s attainment of six months. *Id.* at n.5 (quoting N.Y. DOM. REL. LAW. § 111-a(2) (McKinney Supp. 1983-84)).

¹²103 S. Ct. at 2987 n.4 (quoting N.Y. SOC. SERV. LAW § 372-c (McKinney 1983)). Filing a notice of intent to claim paternity could be accomplished by simply mailing a postcard containing the requisite information to the registry. 103 S. Ct. at 2995.

¹³103 S. Ct. at 2988.

¹⁴*Id.* at 2988-89. Notwithstanding the Ulster court’s awareness of the paternity proceedings pending in Westchester County, and its order staying those proceedings pending ruling on a motion to consolidate the actions, it inexplicably granted the adoption petition without a hearing. Not surprisingly, these procedural circumstances figured significantly in the dissenting Justices’ analysis. *Id.* at 2997 (White, Marshall, and Blackmun, JJ., dissenting). The majority deemed the issue outside federal jurisdiction. *Id.* at 2990 n.10.

¹⁵*See In re the Adoption of Jessica XX*, 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981), *aff’d* 77 A.D.2d 381, 434 N.Y.S.2d 772 (1980).

¹⁶*Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹⁷103 S. Ct. at 2992.

his opportunity to form such a relationship.”¹⁸ Observing that the adoption statutes provided for notice to various categories of putative fathers who likely had assumed some degree of parental responsibility, the Court concluded that Lehr’s failure to avail himself of the opportunity to qualify himself for notice by filing with the putative father registry ultimately defeated his claim to due process protection.¹⁹ Similarly, his equal protection argument was rejected on the basis of his failure to establish any relationship with Jessica prior to the initiation of the adoption hearings. The distinction between Lehr’s limited interest in the child and the natural mother’s custodial role neutered his claim of gender-based discrimination.²⁰

B. Child Custody

1. *Jurisdiction: The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act.*—The jurisdiction labyrinth that is the Uniform Child Custody Jurisdiction Act (UCCJA)²¹ should be rendered less intimidating, if not comprehensible, from study of the survey-period decision in *Funk v. Macaulay*.²² Therein, the court of appeals clarified the concept of continuing and exclusive jurisdiction contained in the UCCJA and examined the jurisdictional implications of the Parental Kidnapping Prevention Act.²³

Funk and Macaulay were divorced in Tippecanoe Superior Court in 1971. Macaulay was awarded custody of the parties’ minor children and, one year later, moved to California on a permanent basis. Ten years of legal skirmishing in the Tippecanoe Superior Court led to Funk filing a petition to modify custody in that forum; he subsequently dismissed that petition and refiled it in California. Macaulay responded by filing a contempt action in the Tippecanoe Superior Court wherein she alleged that Funk, who continued to reside in Indiana, telephoned the children daily and encouraged the children to abuse their mother and engage in

¹⁸*Id.* at 2994.

¹⁹*Id.* at 2994-95. The implications *Lehr* holds for Indiana’s notice requirements are unclear. Indiana’s statutory adoption scheme does not provide for a putative father registry. Subsection e of Indiana Code section 31-3-1-6 (1982) does require that notice be provided to putative fathers. On the other hand, subsection h eliminates the need to give notice to persons who, pursuant to subsection g(3), have relinquished their right by virtue of abandonment, nonsupport, or failure to communicate significantly with the child. *Lehr* provides constitutional support for an interpretation of these provisions which would obviate the notice requirement for a putative father guilty of abandonment. Still, abandonment may be a factual question not properly resolved without a putative father’s opportunity to be heard; for example, in cases where the birth of the child was not made known to the putative father, estoppel principles are of dubious validity.

²⁰103 S. Ct. at 2996.

²¹IND. CODE § 31-1-11.6-1 to -24 (1982).

²²457 N.E.2d 223 (Ind. Ct. App. 1983).

²³28 U.S.C. § 1738A (1982).

acts of truancy. The trial court denied Funk's motion to dismiss based on lack of jurisdiction and found him in contempt.

The court on appeal first found that Macaulay's contempt petition fell within the ambit of the UCCJA in that via her contempt action, Macaulay sought modification of Funk's visitation rights.²⁴ The court then turned to the question whether Indiana or California was the proper forum to adjudicate the contempt petition. Recognizing that California was the "home state" of the minor children and Macaulay pursuant to subsection 3(a)(1) of the UCCJA,²⁵ the court also determined that Indiana retained "significant connections" with Funk and the children per subsection 3(a)(2)²⁶ of the Act's jurisdictional standards. Those "connections" included Funk's continued residency in Indiana, the semiannual visits of the children in Indiana, and the fact that all court records pertaining to the parties' prolonged legal battle concerning the children were located in Indiana. The court concluded that these circumstances bestowed subject matter jurisdiction on Indiana. The court relied heavily on the principle that it is the purpose of the UCCJA to provide that exclusive and continuing jurisdiction remain in the state of the initial custody decree.²⁷

Given its determination that the Tippecanoe Superior Court retained subject matter jurisdiction, the court methodically proceeded to the next hurdle of the UCCJA: whether the trial court's decision to exercise that jurisdiction was justified. Observing that the UCCJA is designed to eliminate forum shopping, the court concluded that purpose would have

²⁴457 N.E.2d at 225. The Uniform Child Custody Jurisdiction Act (UCCJA) sets forth which state has subject matter jurisdiction to make a "child custody determination." IND. CODE § 31-1-11.6-3 (1982). A "child custody determination" is defined in Indiana Code section 31-1-11.6-2 (1982) as any court determination involving custody or visitation rights; excluded therefrom are matters of child support and monetary obligations. In the latter respect, see the survey-period decision in *Lee v. DeSheney*, 457 N.E.2d 604 (Ind. Ct. App. 1983), where it was held that an order entered in the State of Washington for attorney fees, costs of litigation, and travel expenses was outside the purview of the UCCJA.

²⁵The "home state" jurisdictional standard applied to California because Macaulay and the children resided there for more than six months prior to the filing of the petition. See IND. CODE § 31-1-11.6-3(a)(1) (1982).

²⁶Indiana Code section 31-1-11.6-3(a)(2) (1982) provides a corollary basis for subject matter jurisdiction where:

it is in the best interest of the child that a court of this state assume jurisdiction because (A) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships

Id. See generally *In re Marriage of Hudson*, 434 N.E.2d 107 (Ind. Ct. App. 1982).

²⁷The court's authority for that proposition was Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 214 (1981). Professor Bodenheimer was the reporter for the commission which drafted the UCCJA. 457 N.E.2d at 226.

been contravened had the trial court failed to exercise jurisdiction.²⁸ The court also noted that the best hope for ending the turmoil in the children's lives was to resolve the dispute in Indiana, rather than reopening the litigation in a new forum.²⁹

Finally, the court of appeals buttressed its application of the UCCJA by reference to the Parental Kidnapping Prevention Act (PKPA)³⁰ and its principles of continuing jurisdiction and full faith and credit. The court found that the two-step test for jurisdiction defined in the PKPA had been satisfied; accordingly, other jurisdictions were required to afford the Indiana decision full faith and credit.³¹ This attention to the PKPA and the methodical approach³² utilized by Chief Judge Buchanan render *Funk* indispensable to intelligent UCCJA application.

2. *Procedural Aspects of Custody Modifications.*—Two survey-period decisions yielded numerous developments in the law of child custody modification procedure. Due process and default-type custody modifications were the focus of that precedent.

Provisions of the Soldiers' and Sailors' Civil Relief Act of 1940³³ were at issue in *Kline v. Kline*.³⁴ As noncustodial parent, the natural mother filed an emergency petition to modify custody on December 22, 1981, and a hearing date of January 20, 1982, was set. The custodial parent filed a motion for a continuance based on the fact that his military assignment in Okinawa precluded his attendance at the hearing. The motion was granted and, ultimately, hearing on the emergency petition was rescheduled for March 19, 1982. On that date, the father, by counsel, again moved for a continuance; in support thereof, an affidavit from the father's marine commander was submitted which indicated the absence of Sergeant Kline "at this time would adversely

²⁸457 N.E.2d at 228.

²⁹*Id.*

³⁰28 U.S.C. § 1738A (1982).

³¹457 N.E.2d at 229.

³²One commentator has reduced the *Funk* analysis to the following general methodology:

[a]Where in Indiana was the custody determination sought to be modified made?

[b]Then, does that court still have (and want) jurisdiction of the subject matter, case and person under Indiana law?

[c]Then, does that court still have (and want) jurisdiction under the UCCJA?

[d]Then, has the child or some contestant remained a resident of Indiana continuously since the determination?

[e]If the last three questions are answered "yes", the court which made the original determination still has jurisdiction.

The Honorable Robert L. Justice (Cass County Circuit Court), Indiana Jurisdiction Under the Uniform Child Custody Jurisdiction Act, Part II (1984), ICLEF, "Child Custody in Indiana" § 8, pp. 3-4 (1984). Judge Justice indicated that if the last three questions are answered affirmatively as to another jurisdiction, Indiana lacks subject matter jurisdiction.

³³50 U.S.C. app. §§ 501-91 (1982).

³⁴455 N.E.2d 407 (Ind. Ct. App. 1983).

(sic) effect (sic) the capability of this team to accomplish its mission.”³⁵ Counsel indicated his client would not be eligible for leave from Okinawa until late 1982. The trial court denied the motion for a continuance, proceeded to hearing, and granted the petition to change custody.

The court of appeals found the trial court had abused its discretion in failing to grant the father's second motion for a continuance. Relying on provisions of the Soldiers' and Sailors' Relief Act,³⁶ the court determined that the father's absence at the hearing was the direct result of a "military order based upon a legitimate military interest"³⁷ and that proceeding without his presence was necessarily prejudicial to his interests. The court did not address the fact that the husband's second motion for a continuance in effect sought an additional six-month delay in the disposition of an *emergency* petition to modify custody. It is posited that circumstances of a compelling and immediate nature might arise wherein the interests of minor children should also be weighed in the implementation of the Act.³⁸

A custody modification granted in the absence of a parent was also the subject of *In re Marriage of Henderson*.³⁹ There, the court of appeals found the custodial parent had been deprived of her due process right to notice of a hearing to be held on the pending petition to modify custody; in short, no notice of a hearing date was provided to the wife because the trial court failed to set or conduct a hearing on the petition. The elemental nature of that omission belies the complexity of the procedural circumstances present in *Henderson*. The case gave rise to a virtual primer on the mechanical aspects of modification procedure. Included therein was a recitation of the trial court's procedural responsibilities once a petition to modify is filed: "(1) setting the cause for hearing; (2) giving appropriate notice to the parties of the hearing date; and (3) conducting a full hearing on the evidence as to change of custody."⁴⁰ The latter task was particularly emphasized by the appellate court which held that a modification of child custody without a hearing and submission of evidence is never proper, even where one party has failed to appear after proper notice.⁴¹ Recognizing a petition to modify child custody as a matter of grave consequence to all interested parties,⁴²

³⁵*Id.* at 409 (quoting the affidavit of Kline's Team Commander).

³⁶50 U.S.C. app. § 521 (1982).

³⁷455 N.E.2d at 410.

³⁸*Kline* is consistent with authority rendered in other jurisdictions, however. *See, e.g.,* Coburn v. Coburn, 412 So. 2d 947 (Fla. Dist. Ct. App. 1982); Lackey v. Lackey, 222 Va. 49, 278 S.E.2d 811 (1981).

³⁹453 N.E.2d 310 (Ind. Ct. App. 1983).

⁴⁰*Id.* at 313 (citations omitted).

⁴¹*Id.* at 315.

⁴²*Id.* at 316. Relying on *Duckworth v. Duckworth*, 203 Ind. 276, 179 N.E. 773 (1932), the court of appeals found three interests are at stake in matters involving the custody of children: 1) the child's interests; 2) the parents' interests; and 3) the state's

the court reasoned that its effective disposition necessitated evidence to establish that the proposed modification in fact would serve the best interests of the child. Albeit the appropriate and natural progression of existing case precedent, the *Henderson* evidentiary requirement is technically dictum, given the court of appeals' determination that proper notice had not been provided to the absent party.⁴³

3. *Race as a Factor in Custody Determinations.*—The rare occasion of United States Supreme Court review of a state court's custody determination occurred in *Palmore v. Sidoti*,⁴⁴ where certiorari was granted to address the role of racial classifications in questions of child custody of a minor child. In *Palmore*, the father sought transfer of the child because the mother had married a person of another race. Although the trial court acknowledged that the mother and her new spouse were otherwise suitable persons to care for the child, it ordered the change in custody because of "peer pressures" and "social stigmatization" which it concluded the child would inevitably endure as a result of the interracial marriage.⁴⁵ Writing for a unanimous Supreme Court, Chief Justice Burger recognized the continued existence of racial and ethnic prejudices, but unequivocally rejected the notion that such private biases should be sanctioned in law:

The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

. . .

Whatever problems racially-mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.⁴⁶

interests. 453 N.E.2d at 316 n.6. The state's interest was characterized in the survey-period decision of *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984), as "a duty of the highest order to protect the interests of minor children." *Id.* at 1882.

⁴³The *Henderson* court expressly recognized its analysis as dictum, but proceeded to address the evidentiary issue as "one which has not been directly addressed in this jurisdiction." 453 N.E.2d at 315. Other authority has established, however, that when the best interests of minor children are involved, a factual basis for the court's order must be established, even though it be the product of the parties' stipulation. *See, e.g.,* *Stevenson v. Stevenson*, 173 Ind. App. 495, 364 N.E.2d 161 (1977) (oral agreement for custody); *Delong v. Delong*, 161 Ind. App. 275, 315 N.E.2d 412 (1974) (child support); IND. CODE § 31-1-11.5-21(g) (Supp. 1984) (joint custody).

⁴⁴104 S. Ct. 1879 (1984).

⁴⁵*Id.* at 1881.

⁴⁶*Id.* at 1882 (footnote omitted).

On equal protection grounds, the trial court's change of custody was reversed.⁴⁷

C. Child Support

1. *Emancipation.*—The survey-period brought statutory perspective to the fact-sensitive question of what circumstances result in the emancipation of a minor child and, in turn, trigger cessation of the duty of support. Practitioners charged with the uncertain task of advising clients in this troublesome area will find relief in the 1984 amendments to section 12,⁴⁸ wherein the General Assembly codified existing case precedent, defined nonexclusive criteria of emancipation, and gave legal effect to the ameliorative concept of "partial emancipation."

The statutory amendments generally embody the essence of emancipation: via change in the child's socioeconomic circumstances, a new relationship is created between parent and child which relieves the former of the legal obligation of support.⁴⁹ Consistent therewith, the legislature embraced precedent that marriage and military service are emancipating events as a matter of law.⁵⁰ A child's attainment of twenty-one years remains unchanged as the legislature's *de jure* standard of emancipation.⁵¹ Significantly, however, a *de facto* basis of emancipation was established for children eighteen years or older. Those conditions are that "the child: (A) is at least eighteen (18) years old; (B) has not attended a secondary or postsecondary school for the prior four (4) months and is not enrolled in such a school; and (C) is or is capable of supporting himself through employment"⁵² The objective nature of subsections A and B suggests their application will be accompanied by little factual or legal dispute. Subsection C will be the subject of both, however, for the legislature failed to address the distinction between capability of employment and its availability. Obviously, while the unskilled eighteen-year-old high school graduate may be both physically and mentally capable of and willing to assume employment, his self-supportive abilities

⁴⁷*Id.* at 1883. Other jurisdictions addressed the *Palmore* issue but reached differing results. See Annot., 10 A.L.R. 4TH 796 (1981). The role of racial and ethnic heritage has been raised but not reached in this jurisdiction. See *In re Marriage of Davis*, 441 N.E.2d 719, 723 (Ind. Ct. App. 1982).

⁴⁸Act of Feb. 29, 1984, Pub. L. No. 151-1984, § 1, 1984 Ind. Acts 1297, 1297-98 (codified at IND. CODE § 31-1-11.5-12(d), (e) (Supp. 1984)).

⁴⁹See, e.g., *Green v. Green*, 447 N.E.2d 605, 609 (Ind. Ct. App. 1983), *transfer denied*, June 21, 1983.

⁵⁰IND. CODE § 31-1-11.5-12(e)(1), (2) (Supp. 1984). The case law which preceded the legislation is *Green v. Green*, 447 N.E.2d 605 (Ind. Ct. App. 1983), *transfer denied*, June 21, 1983 (marriage), and *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952) (military service).

⁵¹IND. CODE § 31-1-11.5-12(d) (Supp. 1984).

⁵²IND. CODE § 31-1-11.5-12(d)(3) (Supp. 1984).

remain dependent upon the existence of entry-level job opportunities. In that respect, a literal application of the phrase "is capable of supporting himself through employment" would defeat the intent of the 1984 amendment. The vast majority of eighteen-year-olds not enrolled in higher education are physically and mentally "capable" of supporting themselves; significantly, however, it is age twenty-one which the legislature retained as the standard for determining that *as a matter of law* a child is or should be self-supporting.

This analysis of the legislature's intent is further buttressed by its recognition of "partial emancipation," a concept likely to play a significant role in the law of child support. If a trial court finds "the conditions set forth in clauses (A) through (C) are met but that the child is only partially supporting himself or capable of only partially supporting himself, the court may order that support be modified instead of terminated."⁵³ Inclusion of this proviso in section 12 reflects a welcome acknowledgment of the fact that emancipation is neither automatic nor immediate, that socioeconomic independence normally arrives in halves, and that part-time employment and minimum wages often bridge the gap between minority and majority status.⁵⁴ The law's recognition of this human experience and its concomitant pro rata reduction of support will perpetuate confidence in the justness of the law, a matter long-complicated by the popular lay myth that age eighteen is and always has been the *de jure* standard of emancipation in Indiana.⁵⁵

Last, the statutory amendments to section 12 include the provision that emancipation occurs if the child "is not in the care or control of either of his parents."⁵⁶ Again, a literal application of the statutory language should be approached with caution. "Care or control" likely does not refer solely to physical custody and caretaking, but also embraces economic independence of the child. Any other interpretation would ignore well-grounded law that a parent is liable for the costs of necessities provided a child by a third party.⁵⁷

2. Support Guidelines, Schedules, and Automatic Annual Adjustments.—A trial court's usage of support guidelines and its automatic annual adjustment of support orders based on those guidelines were endorsed as "laudable judicial advances" in *Herron v. Herron*.⁵⁸ On appeal, the wife had challenged the propriety of a Hendricks Circuit

⁵³*Id.*

⁵⁴An enlightening look at the peculiar historical origins of the concept of emancipation is contained in H. CLARK, *THE LAW OF DOMESTIC RELATIONS* § 8.3 at 240 (1968).

⁵⁵It is the author's personal experience that pro se respondents routinely resist support enforcement actions on the basis that the minor child has attained the age of eighteen. See also *Hayden v. Hite*, 437 N.E.2d 133 (Ind. Ct. App. 1982).

⁵⁶IND. CODE § 31-1-11.5-12(e)(3) (Supp. 1984).

⁵⁷*Wagoner v. Joe Mater & Assocs.*, 461 N.E.2d 706 (Ind. Ct. App. 1984); see generally *Scott County School Dist. 1 v. Asher*, 263 Ind. 47, 324 N.E.2d 496 (1975).

⁵⁸457 N.E.2d 564, 571 (Ind. Ct. App. 1984).

Court decree fixing support, obligating each parent to submit annual written disclosures of income to the court, and ordering that an annual review and adjustment of the support obligation would occur as of December 31 of each year. The wife asserted that the court's procedure violated the letter and spirit of section 17⁵⁹ in that it permitted modification of the support order without a hearing or proof of a change of circumstances so substantial and continuing as to render the existing order unreasonable. A divided court of appeals rejected the wife's contentions.

The *Herron* majority focused on *Branstad v. Branstad*⁶⁰ and considerations of judicial economy to support its conclusions. In *Branstad*, a support order containing an "escalator clause" provision requiring annual adjustments based on the cost of living index was upheld as consistent with public policy and the purposes of the Dissolution of Marriage Act.⁶¹ Reiterating the *Branstad* analysis, the majority noted that support orders with built-in flexibility serve the best interests of the child by maintaining the purchasing power of the original support order.⁶² Likewise, the *Herron* majority amplified the *Branstad* court's invocation of judicial economy concerns, indulging in a discourse on the role support guidelines play in reducing the "ever-increasing crust of litigation"⁶³ plaguing the judicial system. Noting that the support guidelines at issue were locally-researched and tailored to the court's socioeconomic environs, the majority concluded that there were no reasonable objections to court orders incorporating such guidelines as the measure of child support in dissolution decrees.⁶⁴

⁵⁹Indiana Code section 31-1-11.5-17(a) (Supp. 1984) reads in pertinent part: "Provisions of an order with respect to child support . . . may be modified or revoked. Such modification shall be made only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable."

⁶⁰400 N.E.2d 167 (Ind. Ct. App. 1980).

⁶¹For the unanimous *Branstad* court, Judge Ratliff explained the policy considerations:

In summary, we approve the court's order prescribing an adjustment in the amount of child support based upon changes in the Consumer Price Index because the provision (1) gives due regard to the actual needs of the child, (2) uses readily obtainable objective information, (3) requires only a simple calculation, (4) results in judicial economy, (5) reduces expenses for attorney fees, and (6) in no way infringes upon the rights of either the custodial parent or the non-custodial parent to petition the court for modification of the decree .

. . .

Id. at 171 (footnote omitted). In *Howard v. Reeck*, 439 N.E.2d 727 (Ind. Ct. App. 1982), the inclusion of escalator clauses was entrusted to the trial court's discretion.

⁶²457 N.E.2d at 570.

⁶³Support guidelines no doubt serve that purpose insofar as provisional orders and final decrees are concerned. Judge Young's dissent properly challenges the role of support guidelines in postdissolution support actions, however. *See infra* note 65 and accompanying text.

⁶⁴457 N.E.2d at 571.

Judge Young dissented,⁶⁵ raising a reasoned challenge to the majority's conclusion that the automatic annual adjustment based on a support guideline necessarily results in judicial economy. He observed the procedure required the trial court to annually monitor and review all of its existing support orders, a time-consuming administrative task not statutorily mandated. Additionally, he questioned whether the annual financial statements filed by ex-spouses might result in repeated litigation where the accuracy of those reports is challenged. Finally, he found the Hendricks Circuit Court's procedure violated the evidentiary standard set out in section 17.

It should be noted that in *Herron*, the wife challenged the trial court's procedure *prospectively*.⁶⁶ For that reason, the debate will and must continue. In resolving unsettled issues, two matters must be recognized. First, a support "guideline" which is utilized without a hearing to modify a support order is in fact a "mandatory schedule."⁶⁷ Second, there is a distinct difference between an annual adjustment based on the cost of living index, as in *Branstad*, and annual review which, as in *Herron*, also factors in the respective incomes of the parties; the former generally results in a modest adjustment, while the latter may effect a dramatic redistribution of the support obligations of parents.⁶⁸ Within this framework and in the context of a post adjustment challenge to the administrative approach applied by the Hendricks Circuit Court, its procedure awaits further assessment against the strictures of Section 17.⁶⁹

⁶⁵*Id.*

⁶⁶Both the majority and dissenting opinions suffer from the lack of a factual context in which to assess fully the effects of the Hendricks Circuit Court's procedure. In that respect, *Herron* has an advisory quality which weighs against its value as precedent. Whether the issue was ripe for review is arguable, a matter complicated by the majority's express refusal to dispose of the question on the basis of the "invited error" doctrine even though its applicability was recognized. *Id.* at 569.

⁶⁷Likewise, the phrase "adjustment of support" is but a euphemism for "modification of support" when the parties' respective incomes are considered by the court. Semantics should not obscure the debate.

⁶⁸Herein lies the gist of the wife's procedural argument that the automatic modification placed an unfair burden upon her to disprove any annual adjustment by the court. Assuming an annual review results in a drastic reduction of the husband's obligation, the *Herron* majority found nothing amiss in the fact that the burden of proof has apparently shifted to the wife to establish a change of circumstances so substantial and continuing as to render the *modified* support order unreasonable. That result seems clearly to contravene Indiana Code section 31-1-11.5-17(a) (Supp. 1984), particularly where the validity of income figures submitted by sometimes vexatious spouses is subject to different interpretations. It is not uncommon, for instance, for spouses to place assets in a third party's name to avoid increases or enforcement of support obligations.

⁶⁹Given the *Herron* majority's emphasis on "judicial economy," it is perhaps appropriate that in the final assessment of the procedure employed by the Hendricks Circuit Court, the admonition of Judge Sullivan in *Hardiman v. Hardiman*, 152 Ind. App. 675, 284 N.E.2d 820 (1972), should also be considered:

3. *Health and Hospitalization Insurance.*—Pursuant to Section 12⁷⁰ of the Dissolution of Marriage Act, a support order may include “special medical, hospital or dental expenses” incurred on behalf of the minor child. The scope of the trial court’s authority to ensure that health care is provided to the minor children of divorcees was expanded by the 1984 General Assembly which, via enactment of section 12.1, granted the court discretion to require that a parent maintain “basic health and hospitalization insurance coverage for the child.”⁷¹ When a title IV-D agency petitions the court for such an order, however, the trial court must “consider” granting the petition if the insurance coverage “is available to the parent at reasonable cost.”⁷² Identical provisions were also inserted in Section 13 of the Paternity Act.⁷³

D. *Interspousal Surveillance*

Marital litigation is one of the three major catalysts for the private usage of surveillance in the United States.⁷⁴ That unsettling conclusion was part of the legislative history underlying congressional passage of title III,⁷⁵ which proscribes the intentional interception and recording of

We are not unaware that tedium predominates in most divorce trial calendars, and that such occupy much of a trial judge’s time. . . . However, we cannot condone expeditious disposition of the issues involved in each individual divorce action merely because the successive hearing of many such actions may be less than exciting or professionally challenging. The parties to the litigation, and to be sure, our very system of justice are entitled to a full and complete airing of the *material* issues.

Id. at 680, 284 N.E.2d at 823-24 (emphasis added).

⁷⁰IND. CODE § 31-1-11.5-12 (Supp. 1984).

⁷¹Act of Feb. 29, 1984, Pub. L. No. 152-1984, § 1, 1984 Ind. Acts 1299, 1299-1300 (codified at IND. CODE § 31-1-11.5-12.1 (Supp. 1984)).

⁷²*Id.* See also Act of Feb. 19, 1984, Pub. L. No. 152-1984, § 3, 1984 Ind. Acts 1299, 1300 (codified at IND. CODE § 31-1-11.5-17.1 (Supp. 1984)). A title IV-D agency is statutorily entitled to obtain an order for health insurance coverage by initial or modification proceedings. Curiously, no statutory language authorizes an individual to seek such an award by *modification* proceedings. That dichotomy is surely an oversight rather than a reflection of a legislative obsession for reimbursement of public assistance rendered.

⁷³Act of Feb. 19, 1984, Pub. L. No. 152-1984, § 5, 1984 Ind. Acts 1299, 1300-02 (codified at IND. CODE § 31-6-6.1-13 (Supp. 1984)).

⁷⁴Witnesses testifying before 1968 congressional committees concerned with title III included G. Robert Blakely, Notre Dame Professor and author of the Act, who observed that “private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation.” *Hearings on the Right to Privacy Act of 1967 Before the Subcomm. of Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 413 (1967). Other testimony corroborated Blakely’s view. See *Pritchard v Pritchard*, 732 F.2d 372 (4th Cir. 1984).

⁷⁵18 U.S.C. §§ 2510-20 (1982). Extensive analysis of the Act’s applicability to interspousal surveillance is contained in Note, *Interspousal Electronic Surveillance and Title III*, 12 VAL. U.L. REV. 537 (1978).

oral and wire communications.⁷⁶ Since its inception, the applicability of the Act to interspousal electronic surveillance is a matter which has troubled courts, resulting in dichotomous case precedent. Some courts have followed the lead of *Simpson v. Simpson*,⁷⁷ where the Fifth Circuit Court of Appeals concluded that Congress did not intend the Act to reach interspousal surveillance. The Sixth Circuit Court of Appeals' decision in *United States v. Jones*,⁷⁸ that the marital relationship was within the scope of the Act's prohibition, has been invoked by other courts.⁷⁹ The survey-period saw the balance tipped.

In *Pritchard v. Pritchard*,⁸⁰ the Fourth Circuit Court of Appeals confronted the question whether title III authorized a civil action against a former spouse for her interception and recordation of conversations conducted over the family telephone. Relying on *Simpson*, the district court had dismissed the suit. The Fourth Circuit examined the language and legislative history of title III and found no support for the *Simpson* court's conclusion that interspousal surveillance was implicitly exempted from the Act.⁸¹ Concurring in the *Simpson* court's resolution that "state and not federal courts are better suited to handle domestic conflicts,"⁸² the Fourth Circuit nevertheless reinstated the civil cause of action and remanded it to the district court. A similar result was reached in *Burgess v. Burgess*,⁸³ where a divided Florida Supreme Court found that the

⁷⁶Title III establishes both criminal and civil sanctions for its violation. 18 U.S.C. § 2511 (1982) (criminal penalties), 18 U.S.C. § 2520 (1982) (civil penalties).

⁷⁷490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). Courts which have implemented a *Simpson* approach include *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974) and *Baumrind v. Ewing*, 276 S.C. 350, 279 S.E.2d 359, *cert. denied*, 454 U.S. 1092 (1981).

⁷⁸542 F.2d 661 (6th Cir. 1976).

⁷⁹*Flynn v. Flynn*, 560 F. Supp. 922 (N.D. Ohio 1983); *Heyman v. Heyman*, 548 F. Supp. 1041 (N.D. Ill. 1982); *Citron v. Citron*, 539 F. Supp. 621 (S.D.N.Y. 1982); *Gill v. Willer*, 482 F. Supp. 776 (W.D.N.Y. 1980); *Kratz v. Kratz*, 477 F.Supp. 463 (E.D. Pa. 1979); *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 226 S.E.2d 347 (1976).

⁸⁰732 F.2d 372 (4th Cir. 1984).

⁸¹*Id.* at 374. The Fourth Circuit unequivocally rejected the twin postulates of the *Simpson* rationale. First, it found no ambiguity in the language of title III to warrant resort to rules of statutory interpretation. *Id.* at 373. Second, it found the legislative history indicated Congress was fully aware of the extent of interspousal surveillance and, having failed to create an express exception for such conduct, intended it to fall within the statutory proscription. *Id.* at 373-74.

⁸²*Id.* at 374. The implications for principles of comity and federalism which troubled the *Simpson* court are examined in Note, *supra* note 75, at 550-51.

⁸³447 So. 2d 220 (Fla. 1984), *rev'g* 417 So. 2d 1173 (Fla. Dist. Ct. App. 1982) (applying state law). The majority's observations regarding the juxtaposition of electronic surveillance and the sanctity traditionally accorded the marital relationship are noteworthy:

It is undisputed that spying and prying by one spouse into the private telephone conversations of the other does not contribute to domestic tranquility or assist in preserving the marital estate. . . . Eavesdropping, by nature, undermines the faith and trust upon which the institution of marriage is founded.

Id. at 222-23 (citation omitted). *Accord* Note, *supra* note 75, at 551.

doctrine of interspousal tort immunity still extant in that state did not preclude a civil remedy for one spouse's electronic surveillance of the other.

This increasing tendency of courts to cast aside protection for spouses who engage in electronic surveillance of their marital partners warrants the attention of Indiana practitioners, whose courts have held that evidence acquired by such surreptitious techniques is admissible for impeachment purposes.⁸⁴ Whatever strategic value the fruits of interspousal electronic surveillance may have in dissolution proceedings, eavesdropping should be used only with recognition of the potential for civil and criminal liability.⁸⁵

E. Maintenance

1. Statutory Developments: Maintenance for the Custodial Parent and the Displaced Homemaker.—Dramatic statutory changes in the law of maintenance were promulgated by the 1984 General Assembly. Effective September 1, 1984, spouses whose availability for employment is effectively precluded by their responsibilities as the custodial parent may be eligible for maintenance "in an amount and for a period of time as the court deems appropriate."⁸⁶ Similarly, spouses whose marital role as homemaker has adversely affected their employability may seek "rehabilitative maintenance"⁸⁷ for a period not in excess of two years. With these amendments to section 11, the legislature has radically restructured the framework in which a client's dissolution case must be assessed.

The provisions for "custodial maintenance" provide:

If the court finds a spouse lacks sufficient property, including marital property apportioned to him, to provide for his needs and that spouse is the custodian of a child whose physical or mental incapacity requires the custodian to forego employment, the court may find that maintenance is necessary for that spouse in an amount and for a period of time as the court deems appropriate.⁸⁸

⁸⁴*In re Marriage of Lopp*, 268 Ind. 690, 378 N.E.2d 414 (1978); *see also*, *Jacks v. State*, 271 Ind. 611, 394 N.E.2d 166 (1979). The Act expressly precludes the use of the fruits of electronic surveillance for evidentiary purposes. 18 U.S.C. § 2515 (1982).

⁸⁵Criminal penalties include a \$10,000 fine and/or imprisonment for a period not in excess of five years. 18 U.S.C. § 2511 (1982). Civil penalties include actual damages not less than \$1,000, punitive damages, and attorney fees and costs. 18 U.S.C. § 2520 (1982). The doctrine of interspousal tort immunity was abrogated in Indiana in *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972).

⁸⁶Act of Mar. 2, 1984, Pub. L. No. 150-1984, § 2, 1984 Ind. Acts 1290, 1292-93 (codified at IND. CODE § 31-1-11.5-11(d)(2) (Supp. 1984).

⁸⁷*Id.*

⁸⁸*Id.*

Two prerequisites for an award of custodial maintenance are established. First, there must exist a child whose "physical or mental incapacity requires the custodian to forego employment."⁸⁹ The vagueness inherent in the concept of a minor child's physical or mental incapacity must be interpreted by reference to the legislature's use of the mandatory term "requires": unemployment must be necessitated by the custodial role. Consequently, the extent of job opportunities and the custodian's qualifications for employment should not be considered germane.⁹⁰ The focus must be the individual condition and circumstances of the minor child and the resulting demands upon the custodian. The experience of other jurisdictions with similar legislation⁹¹ indicates that factors relevant to those considerations include the number and ages of children,⁹² their physical and emotional needs,⁹³ the suitability and availability of third party assistance to meet those needs,⁹⁴ and a child's enrollment in school.⁹⁵

The second prerequisite to an award of custodial maintenance is that the custodian lacks "sufficient property, including marital property apportioned to him, to provide for his needs."⁹⁶ Obviously, satisfaction of this requirement cannot be established until the trial court has calculated the manner in which the marital assets will be distributed; not until that point in time can the resources of the custodian be reduced to a sum certain. On the other hand, the needs of the custodial parent can be established at final hearing with the presentation of evidence

⁸⁹*Id.* (emphasis added).

⁹⁰Those factors are part of the remedy of rehabilitative maintenance. *See infra* notes 101-06 and accompanying text.

⁹¹Other jurisdictions generally have adopted the language of the Uniform Marriage and Divorce Act, wherein the award of custodial maintenance is made dependent upon the existence of "a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home," together with a lack of financial resources "to provide for his [the custodian's] reasonable needs." UNIF. MARRIAGE AND DIVORCE ACT, § 308 9A U.L.A. 160 (1979). *See In re Marriage of Thornqvist*, 79 Ill. App. 3d 791, 399 N.E.2d 176 (1979); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979); *Cook v. Cook*, 614 P.2d 511 (Mont. 1980).

⁹²*See, e.g., Reyna v. Reyna*, 78 Ill. App. 3d 96, 398 N.E.2d 641 (1979) (four children, including a two-year-old); *In re Marriage of Vashler*, 183 Mont. 444, 600 P.2d 208 (1979) (nine-year-old child). Indiana precedent suggests, however, that age alone should not be dispositive of the question whether a child is incapacitated. *Cf. Bole v. City of Ligonier*, 130 Ind. App. 362, 161 N.E.2d 189 (1959) (addressing whether advanced age of itself can be considered as a ground for incapacity).

⁹³*See Smith v. Smith*, 105 Ill. App. 3d 980, 434 N.E.2d 1151 (1982) (ten-year-old child with emotional problems).

⁹⁴Babysitting and day care expenses routinely figure in the calculation of child support obligations. Where such services are available and do not impair the best interests of the child, the custodian may be capable of employment. *Cf. Richie v. Richie*, 596 S.W.2d 32 (Ky. Ct. App. 1980) (enrollment in school enabled mother to work outside the home).

⁹⁵*Id.*

⁹⁶IND. CODE § 31-1-11.5-11(d)(2) (Supp. 1984).

regarding the monthly costs of those needs. Existing Indiana precedent dictates that the statutory term “needs” be regarded as a relative term defined with reference to the standard of living established in the marriage.⁹⁷

It also should be recognized that the trial court has authority to award custodial maintenance of virtually unlimited duration: “for a period of time as the court deems appropriate.”⁹⁸ This provision potentially bears significant adverse consequences for the legislature’s policy of encouraging amicable settlements of marital dissolutions. Spouses who might otherwise accept the noncustodial parenting role may opt to litigate custody in the face of the significant economic consequences which can follow from their acquiescence. That specter should be tempered by the realization that maintenance awards bear tax benefits⁹⁹ and are subject to modification if conditions so warrant.¹⁰⁰

The concept of “rehabilitative maintenance” represents the General Assembly’s overdue response to the reality of the “displaced homemaker.”¹⁰¹ Following the nationwide assault upon the concept of alimony

⁹⁷One factor in the calculation of Indiana’s traditional maintenance awards has been the standard of living established in the marriage. See *Temple v. Temple*, 164 Ind. App. 215, 328 N.E.2d 227 (1975). Other jurisdictions have applied the standard to custodial and rehabilitative maintenance. See, e.g., *In re Marriage of Rimmele*, 102 Ill. App. 3d 88, 429 N.E.2d 879 (1981). “Needs” are not automatically commensurate with the marital standard of living, of course. *Brueggemann v. Brueggemann*, 551 S.W.2d 853 (Mo. Ct. App. 1977).

⁹⁸IND. CODE § 31-1-11.5-11(d)(2) (Supp. 1984).

⁹⁹See *infra* note 110 for a discussion of tax aspects.

¹⁰⁰Since the inception of Indiana’s Dissolution of Marriage Act in 1973, maintenance awards based on the physical or mental incapacity of a spouse have been subject to “further order of the court.” IND. CODE § 31-1-11.5-9 (c) (Supp. 1984). Curiously, no such qualification was included in the statutory amendments authorizing custodial or rehabilitative maintenance. This legislative oversight should not preclude the potential modification of either of the latter forms of maintenance. The spirit of the legislation must prevail: if the recipient of maintenance has remarried, obtained gainful employment, inherited significant sums, or won the Irish sweepstakes, it would defy the purpose of custodial or rehabilitative maintenance to deny the obligated spouse recourse to the courts for relief from the obligation. Pursuant to *Farthing v. Farthing*, 178 Ind. App. 336, 382 N.E.2d 941 (1978), modification of a maintenance award is governed by the standard of proof enunciated in Indiana Code section 31-1-11.5-17(a) (Supp. 1984): “a showing of changed circumstances so substantial and continuing as to make the terms unreasonable.”

¹⁰¹The term “displaced homemaker” is generally attributed to Justice Gardner in his landmark opinion in *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977), where he bluntly capsulized the concept:

The new Family Law Act, and particularly Civil Code, section 4801, has been heralded as a Bill of Rights for harried former husbands who have been suffering under prolonged and unreasonable alimony awards. However, the Act may not be used as a handy vehicle for the summary disposal of old and used wives. A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime. If a woman is able to do so, she certainly should support

which marked American jurisprudence in the early 1970's, courts and commentators alike recognized the inequitable fate which befell spouses who, by virtue of their marital roles, held no reasonable postdissolution prospect of employment.¹⁰² Historically, our culture has imposed that inequity upon ex-wives.¹⁰³ Without regard to gender, however, the 1984 legislature has provided that for a transitional period not in excess of two years from the date of final decree, spouses may be awarded maintenance while they rehabilitate their employment skills.

The propriety and amount of the rehabilitative award are governed by specific statutory considerations:

(A) the educational level of each spouse at the time of marriage and at the time the action is commenced;

(B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;

(C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and

(D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment.¹⁰⁴

The statutory considerations parallel those given effect in sister states, where extensive litigation has established the issue as a fact-sensitive matter of competing policy considerations.¹⁰⁵ Both spouses' circumstances must be weighed, for it is the purpose of rehabilitative maintenance to promote individual self-sufficiency. Given the two year time limitation present in our statutory scheme, that goal will not be realized in every case.¹⁰⁶ Nonetheless, the remedy of rehabilitative maintenance represents a valuable transitional vehicle for the homemaker's postdissolution economic footing.

herself. If, however, she has spent her productive years as a housewife and mother and has missed the opportunity to compete in the job market and improve her job skills, quite often she becomes, when divorced, simply a "displaced homemaker."

67 Cal. App. 3d at 420, 136 Cal. Rptr. at 637.

The concept is discussed in the context of Indiana authority in Garfield, *Indiana's Displaced Homemakers*, 23 RES GESTAE 80 (1979).

¹⁰²Garfield, *supra* note 101, at 80.

¹⁰³As Professor Garfield parenthetically noted in her article, "Because the househusband was unknown 20-30 years ago, she [the displaced homemaker] will invariably be female." *Id.* at 81. An excellent analysis of these historical and policy considerations is found in *Turner v. Turner*, 158 N.J. Super. 313, 385 A.2d 1280 (1978), where the remedy of rehabilitative maintenance was invoked by the court.

¹⁰⁴IND. CODE § 31-1-11.5-11(d)(3) (Supp. 1984).

¹⁰⁵See authorities collected in Annot., 97 A.L.R. 3d 740 (1980) and UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 160 (1979).

¹⁰⁶Some spouses may be rendered permanently unemployable by a juxtaposition of

2. *Findings of Fact and the Award of Maintenance.*—The General Assembly complemented its survey-period amendments authorizing custodial and rehabilitative maintenance with legislation which requires the trial court to make findings of fact whenever any form of maintenance is awarded.¹⁰⁷ The legislature thereby rendered moot the debate raised in *Coster v. Coster*,¹⁰⁸ where Judge Ratliff challenged the majority's conclusion that such findings were not necessary to support an award of maintenance.¹⁰⁹ The legislature's mandate ensures the type of maintenance awarded will be identified in the final decree, a matter important to appellate review and principles of continuing jurisdiction. Likewise, the fact-finding requirement will eliminate doubts as to the tax ramifications of any particular award and, in turn, ensure the trial court has apprised itself of all monetary aspects of its decree.¹¹⁰

F. Property

1. *Property Settlements: Oral versus Written Agreements.*—No single survey-period decision in domestic relations potentially bears such workaday consequences for the family law practitioner as *McClure v. McClure*.¹¹¹ In *McClure*, the court of appeals dealt a setback to certainty in the law of property settlements.

Consistent with the General Assembly's stated policy "[t]o promote the amicable settlements of disputes"¹¹² which attend the breakup of

local economic conditions, age, and their prolonged absence from the job market; other jurisdictions accommodate this inevitable consequence with permanent awards of maintenance subject to further order of the court. See, e.g., *Kalmutz v. Kalmutz*, 299 So. 2d 30 (Fla. Dist. Ct. App. 1974); *In re Marriage of Wisniewski*, 107 Ill. App. 3d 711, 437 N.E.2d 1300 (1982). Indiana's statutory scheme precludes such awards absent physical or mental incapacity of a spouse. The two year limitation does serve two purposes: 1) the obligated spouse is provided with certainty as to the nature and extent of his obligation; and 2) indolence is discouraged as the recipient is provided with an immediate time period in which to pursue training or employment. See *Turner v. Turner*, 158 N.J. Super. 313, 385 A.2d 1280 (1978).

¹⁰⁷Act of Mar. 2, 1984, Pub. L. No. 150-2984, § 1, 1984 Ind. Acts 1290, 1290-91 (codified at IND. CODE § 31-1-11.5-9(c) (Supp. 1984). The amendment states that "[t]he court may order maintenance in final decrees entered under subsections (a) and (b) after making the findings required under section 11(d) of this chapter."

¹⁰⁸452 N.E.2d 397 (Ind. Ct. App. 1983.)

¹⁰⁹*Id.* at 404 (Ratliff, J., concurring).

¹¹⁰Payments by one spouse for the support of the other are "income" to the recipient and deductible by the payor. Property distributed pursuant to a final decree does not necessarily bear those tax ramifications. See *Hicks v. Fielman*, 421 N.E.2d 716 (Ind. Ct. App. 1981) (citing 26 U.S.C. §§ 71 (a)(1), 215 (1967)). An express finding that an award is maintenance alleviates the need to resort to the subjective set of factors developed to distinguish between awards of maintenance and property settlements. See *Pfenninger v. Pfenninger*, 463 N.E.2d 115 (Ind. Ct. App. 1984).

¹¹¹459 N.E.2d 398 (Ind. Ct. App. 1984) (Sullivan, J., concurring).

¹¹²IND. CODE § 31-1-11.5-10(a) (1982). See generally *Meehan v. Meehan*, 425 N.E.2d 157 (Ind. 1981); *Stockton v. Stockton*, 435 N.E.2d 586 (Ind. Ct. App. 1982).

a marriage, authority for parties to "agree *in writing*" to the disposition of property is contained in Section 10¹¹³ of the Dissolution of Marriage Act. Notably, no statutory authority for the *oral* settlement of property issues exists in the Act. In the 1977 decision of *Waite v. Waite*,¹¹⁴ however, the court of appeals held it is not error for a trial court to adopt and incorporate an oral property settlement if it determines on the basis of those factors enumerated in Section 11¹¹⁵ that the agreement is just and reasonable.

McClure involved a factual interpolation of these two basic rules of property settlements. The final dissolution hearing of Mildred and Emory McClure was set on the trial court's calendar as a contested matter. As commonly occurs, the parties and their attorneys arrived at the courthouse for final hearing and entered into *ex parte* negotiations which culminated in an oral agreement for the disposition of their property. The parties then convened in open court and, in conjunction with the necessary evidence regarding the breakdown of their marriage and the status of their children,¹¹⁶ orally stipulated the terms of their proposed property settlement into the record. Both the wife and the husband personally indicated their assent to the agreement. At the prompting of the trial judge, both attorneys verbally represented that the agreement would be reduced to writing. The hearing concluded with the following discussion between court and counsel:

"The Court: Fine. I do wish both counsel would sign it though, because I had another one in here, well all the time you get one, they don't pass it to the other counsel and all of a sudden, why, someone wants to set aside the Divorce Decree and all that so, have everybody sign it. [Counsel for Mildred] Both counsel will sign it.

¹¹³IND. CODE § 31-1-11.5-10(a) (1982).

¹¹⁴172 Ind. App. 357, 360 N.E.2d 268 (1977).

¹¹⁵IND. CODE § 31-1-11.5-11 (Supp. 1984). The factors enumerated therein are:

(1) The contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker.

(2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.

(3) The economic circumstances of the spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell therein for such periods as the court may deem just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

¹¹⁶IND. CODE § 31-1-11.5-8 (1982) (dealing with final hearings). The McClures' children were emancipated.

The Court: We're really in no hurry for it. Get it in the first part of next week, that's alright if everybody can sign it. Okay, thank you gentlemen."¹¹⁷

The trial court then entered the following entry into its order book: "Dissolution granted; *hold for decree and property settlement*."¹¹⁸

The trial court's observation that "all of a sudden, . . . someone wants to set aside the Divorce Decree and all that" then turned prophecy. Sometime subsequent to the final hearing, the wife recanted her acceptance of the terms of the agreement. Two weeks after final hearing, with the record still lacking a signed written agreement,¹¹⁹ the wife filed a petition to set aside the oral settlement. She asserted that stress suffered by her at the time of the final hearing precluded her knowing acceptance of the property settlement terms;¹²⁰ she also posited a *Waite*-based argument that the oral in-court agreement could not be made binding upon the parties because the trial court had not received and heard evidence establishing that the settlement was in fact just and reasonable. Following a hearing, the trial court denied the wife's petition and "approved" the property settlement "as it appears in transcript" of final hearing.¹²¹ A decree of dissolution and a document delineating the terms of the oral property agreement were subsequently filed with the court. The latter document bore only the signatures of the husband and his counsel. The dissolution decree and document of property disposition were approved and signed by the trial judge and the parties were ordered to effectuate the terms of their settlement as orally tendered at final hearing. The wife's motion to correct errors was denied and she appealed. On appeal, the wife reiterated her *Waite*-based argument. The court of appeals, however, ignored that contention and its precedential foundation. The appellate court instead disposed of the wife's appeal on the basis of her claim that the trial court had erred in adopting a property settlement which she had timely repudiated.¹²² For the majority, Chief

¹¹⁷459 N.E.2d at 399 (quoting the trial court record).

¹¹⁸*Id.* (quoting the trial judge's order book entry of Nov. 24, 1982).

¹¹⁹It is unclear whether the delay prompted the wife's change of heart or the wife's recantation precipitated the delay.

¹²⁰Although this issue was not addressed on appeal, it underscores the attention *McClure* warrants. Emotion pervades divorce; stress, vacillation, and vindictiveness commonly attend the breakup of a marriage. A written and signed agreement militates against the ability of a party to successfully assert, for whatever reason, that the terms of a settlement were not knowingly or voluntarily accepted or that counsel acted improperly in binding the party to the agreement. See generally *Bramblet v. Lee*, 162 Ind. App. 654, 320 N.E.2d 778 (1974).

¹²¹459 N.E.2d at 400 (emphasis omitted).

¹²²*Id.* at 401. It is interesting to observe that the wife regarded her *Waite*-based argument as the more compelling of her contentions. The "Argument" portion of her brief began with her *Waite* argument, which continued for 13 of the 15 pages devoted

Judge Buchanan emphasized at the outset of his opinion that the "salient fact in this case is that there never was a property settlement agreement in writing between the parties for the court to approve."¹²³ Chief Judge Buchanan quoted Section 10 of the Dissolution of Marriage Act and observed, "The plain language of this provision requires a written agreement."¹²⁴ He also noted that paragraph b of Section 10 requires the court's approval, incorporation, and merger of the terms of the agreement into the dissolution decree. Unsettling language was then injected into the opinion: "The simple two-step process necessary to bring a valid property settlement agreement into existence never occurred in this case."¹²⁵ Given the unequivocal nature of the court's language and the analysis preceding it, the reader might justifiably conclude that the court ruled only *written* property settlements are valid in Indiana.

That was not the basis for the court's holding, however, as its subsequent factual analysis reveals. Ultimately, the court's conclusion that the agreement was not properly binding on the parties was predicated on two bases: 1) the trial court did not *formally approve*¹²⁶ the agreement at the hearing where it had been orally tendered, but rather required submission in writing; and 2) the wife repudiated the agreement prior to its submission in writing.¹²⁷ Chief Judge Buchanan characterized the trial court's requirement of a written agreement as a "condition precedent" to approval and concluded that "[the wife's] right to repudiate

to that section. Brief for Appellant at 4-15; 459 N.E.2d at 400 (wife's attack premised on court's failure to determine the reasonableness of agreement). The prominence of *Waitt* in the wife's brief highlights the majority's unwillingness to rely on *Waitt*.

¹²³459 N.E.2d at 400.

¹²⁴*Id.* (footnote omitted). Section 31-1-11.5-10(a) of the Indiana Code provides "the parties may agree in writing" to the disposition of their property. Those who would argue the "plain language" of section 10(a) does not *require* a written agreement should realize the majority's statement is supported by precedent not cited in its opinion. Our appellate tribunals have held it is not the judiciary's prerogative to expand the Dissolution of Marriage Act beyond that authority expressly or implicitly granted by its statutory terms. *See, e.g.,* Taylor v. Taylor, 436 N.E.2d 56 (Ind. 1982), *rev'g* 425 N.E.2d 649 (Ind. Ct. App. 1981); Lord v. Lord, 443 N.E.2d 847 (Ind. Ct. App. 1982). In section 10(a), authority is granted for written property settlements; the use of oral agreements was neither approved nor disapproved. Obviously, the majority wished to avoid the question whether oral agreements were permissible, for it neither invoked the rule found in *Lord* and *Taylor* nor expressly recognized the *Waitt* court's conditional approval of the use of oral property settlements.

¹²⁵459 N.E.2d at 401.

¹²⁶*Id.* Again, the majority opinion suffers a lack of clarity. In the husband's brief, he specifically argued that the trial court had approved the oral agreement at final hearing. Brief for Appellee at 17, 23; 459 N.E.2d 400. Inasmuch as the husband's factual assertions were not addressed by the majority, it must be assumed the court relied on the rule that a court speaks only through its official orders and entries. *See* Meehan v. Meehan, 425 N.E.2d 157, 159 (Ind. 1981). The trial court did not expressly approve the McClures' agreement in its docket and order book entry for the final hearing. 459 N.E.2d at 399.

¹²⁷459 N.E.2d at 401.

before the two-step process is complete has been upheld by this court. . . . We need not elaborate further, but would emphasize that our decision is grounded solely on error by the trial court in approving an agreement that was timely repudiated.¹²⁸

The closing caveat clarifying the import of the majority opinion dispels any notion that its language necessarily should be interpreted to preclude the use of oral agreements. Indeed, Chief Judge Buchanan stated in footnote one of his opinion that the majority was not deciding the “validity of a stipulated oral agreement.”¹²⁹ Ultimately, no black letter rule of law can be drawn from *McClure*. Apparently, however, had the trial court formally approved the agreement at the close of the final hearing, the wife’s posthearing renunciation of the agreement would have been without consequence. Solely on this basis did Judge Sullivan join the majority opinion. In his concurring opinion, he carefully disassociated himself from the implication in the majority’s analysis that only written property settlements may be valid.¹³⁰

Practitioners should warily recognize this aspect of *McClure* and do the obvious: *whenever possible, reduce any property agreement to writing prior to final hearing*. In that respect, the vagueness of *McClure* serves a positive purpose, for the physical act of reducing an oral agreement to written and signed form is deemed to ensure that the parties have carefully considered and accepted its terms.¹³¹ Lacking that document, however, a practitioner who proceeds to an uncontested final hearing without a written agreement should recognize two priorities: 1) presenting evidence to establish the terms of the agreement are just and reasonable, in accordance with *Waitt*; and 2) attempting to obtain formal approval of the agreement on the trial court’s order book entry, as per the implication of *McClure*. The need for an immediate ruling by the trial court which *McClure* fosters is unfortunate. The trial court’s responsibility to determine that, based on the evidence presented, the terms of an oral agreement are just and reasonable necessarily includes the license to take that question under advisement. Caution is particularly demanded when the parties’ agreement also embraces matters of custody, as commonly occurs.¹³² A trial court’s exercise of that prerogative should not be

¹²⁸*Id.*

¹²⁹*Id.* at 400 n.1. Ironically, the footnote ends with a citation to *Waitt*.

¹³⁰*Id.* at 401 (Sullivan, J., concurring). In his concurring opinion, Judge Sullivan cited *Bramblett v. Lee*, 162 Ind. App. 654, 320 N.E.2d 778 (1974), where it was held that pursuant to Indiana Code section § 34-1-60-5, an attorney has authority to orally bind a client to an agreement, even where it is presented by telephone and results in judgment of paternity. Practitioners should recognize that authority no longer extends to paternity default determinations. See *infra* note 177 and accompanying text.

¹³¹*Waitt v. Waitt*, 172 Ind. App. at 362, 360 N.E.2d at 272.

¹³²To be sure, the trial court’s authority to reject or modify a *property* settlement is limited to instances of “unfairness, unreasonableness, manifest inequity . . . or [where] the execution of the agreement was procured through fraud, misrepresentation, coercion,

restricted by the possibility that an otherwise just and reasonable agreement may be jeopardized by the effects a brief delay may work on the hearts and minds of persons experiencing divorce.

Given the practical significance to parties and practitioners of the questions raised by *McClure*, the legislature should act immediately to define the capacity of parties to submit oral property settlements. The present confusion may be the result of our appellate tribunals' traditional unwillingness to expand the Dissolution of Marriage Act beyond its letter.¹³³ Authority for the oral settlement of property rights either should be expressly granted or denied. If granted, it is submitted that a proviso be included whereby, absent good cause shown, parties to an oral agreement tendered in open court be bound thereto for a period of not less than ten days.¹³⁴

2. *Alimony in Gross: Interest versus Present Value Discounted.*—Section 11 of the Dissolution of Marriage Act authorizes trial courts to “divide the property of the parties . . . either by division of the property in kind, or by setting the same or parts thereof over to one (1) of the spouses and *requiring either to pay such sum, either in gross or in installments, as may be just and proper.*”¹³⁵ The Act is silent, however, regarding whether a monetary award made payable in installments, characterized by one court as “alimony in gross,”¹³⁶ should bear interest. The failure of trial courts to award interest on installment plan awards recently has been attacked by ex-spouses; their appellate challenges have resulted in an edifying collection of precedent regarding the valuation of such awards. The focus of that precedent is the economic principle of “present value discounted” or, as described in the survey-period

duress, or lack of full disclosure.” *Stockton v. Stockton*, 435 N.E.2d 586, 589 (Ind. Ct. App. 1982). It is not uncommon, however, for the parties' property settlement to also embrace matters of custody, visitation and support. *See, e.g., Meehan v. Meehan*, 425 N.E.2d 157, 158 (Ind. 1981). Agreements concerning minor children demand stricter scrutiny from trial courts. *Cf. Stevenson v. Stevenson*, 173 Ind. App. 495, 364 N.E.2d 161 (1977) (factual basis must be established for custody agreement); *Delong v. Delong*, 161 Ind. App. 275, 315 N.E.2d 412 (1974) (factual basis must be established for support agreement). Practitioners also should recognize that, because of *McClure*, a trial court, like the court in *McClure*, might refrain from approval of an oral agreement pending written submission for the purpose of ensuring a party has carefully considered and accepted its terms. *See supra* note 131 and accompanying text. That occurrence is more probable when one of the parties proceeds *pro se*. *E.g., Stockton v. Stockton*, 435 N.E.2d 586 (Ind. Ct. App. 1982).

¹³³*See supra* note 124. This reluctance perhaps explains the narrow and technical approach employed by the appellate court in *McClure* as well as its refusal to utilize the precedent established in *Waitt*.

¹³⁴The ten day period of presumptive enforceability would perpetuate the trial court's prerogative to take the propriety of an oral agreement under advisement.

¹³⁵IND. CODE § 31-1-11.5-11(b) (1982) (emphasis added). The authority of the court to make a monetary award payable in installments was summarily affirmed during the survey period. *Boren v. Boren*, 452 N.E.2d 452, 455 (Ind. Ct. App. 1983).

¹³⁶*Van Riper v. Keim*, 437 N.E.2d 130, 132 n.1 (Ind. Ct. App. 1982).

decision of *In re Marriage of Merrill*,¹³⁷ “the time value of money.”¹³⁸

In *Merrill*, the husband was ordered to pay the wife \$10,415 in annual installments of \$1,000. The wife challenged the failure of the trial court to award interest on the total monetary sum, arguing the actual value of \$10,415 made payable over eleven years was less than \$7,000. The court of appeals agreed with her mathematical assessment of the total time would take on her award, but rejected her contention that the trial court had erred in failing to award her interest. Judge Staton explained:

[T]he decision whether a lump sum award payable in installments will bear interest rests within the sound discretion of the trial court. . . . We presume that trial courts are aware of the time value of money and take it into consideration when dividing property and deciding whether interest should be awarded.¹³⁹

The presumption that trial courts do consider the “time value” of money juxtaposes neatly with the 1982 decision of *Whaley v. Whaley*.¹⁴⁰ There, the trial court expressly refused to adjust an installment award to reflect its present value discounted because no evidence had been presented on which to base the mathematical computation. The court of appeals reversed, holding that the appropriate method for computing a monetary award was to discount the sum to its present value.¹⁴¹ On remand, the trial court was instructed either to include a provision for interest or take judicial notice of annuity tables.¹⁴²

The significant distinction between *Whaley* and *Merrill* is that in the former case, the trial court expressly refused to consider present value discounted, while in the latter case, the trial court’s decree was silent with respect to the time value of money. In order to ensure that a trial court in fact does assess the impact of present value discounted on an award of alimony in gross, practitioners who find that their clients may receive such an award should: 1) specifically request an assessment of interest to accommodate the time value of any monetary award; 2) introduce annuity tables or move that judicial notice be taken of those tables; and 3) request that specific findings of fact be rendered by the court.¹⁴³ Two purposes are served by these prophylactic measures. A client is assured that the trial court has fully assessed the present value of an award of alimony in gross. In addition, an objective foundation

¹³⁷455 N.E.2d 1176 (Ind. Ct. App. 1983).

¹³⁸*Id.* at 1178.

¹³⁹*Id.* at 1177-78 (citing *Van Riper v. Keim*, 437 N.E.2d 130 (Ind. Ct. App. 1982)).

¹⁴⁰436 N.E.2d 816 (Ind. Ct. App. 1982).

¹⁴¹*Id.* at 820.

¹⁴²*Id.* at 821. An award of interest is governed by the provisions of Indiana Code section § 24-4.6-1-101 (Supp. 1984). See, e.g., *Van Riper v. Keim*, 437 N.E.2d 130, 132 (Ind. Ct. App. 1982)

¹⁴³IND. R. TR. P. 52.

for appeal is established. The latter purpose is important not only to a potential challenge to the trial court's refusal to award interest,¹⁴⁴ but also for the purpose of satisfying the "abuse of discretion" standard of appellate review, the standard applied to challenges to the overall disposition of marital assets and liabilities.¹⁴⁵

3. *Property Disposition: Assets, Liabilities, and the Effect of Financial Developments Pendente Lite*.—Survey-period appeals from contested final hearings yielded numerous developments in the area of property disposition. Precedent collected herein involved circumstances of a recurrent nature not heretofore addressed by Indiana's appellate tribunals.

A philandering spouse's accumulation of assets in joint title with his paramour was the subject of *Kapley v. Kapley*.¹⁴⁶ The Kapleys' marriage spanned a period of forty years from nuptials to the date of "final separation."¹⁴⁷ Throughout the latter seven years of that marriage, however, the husband had physically separated from his wife and had engaged in a bigamous relationship which led to his accumulation of a joint title interest in real property located in Minnesota and Florida. In the Kapleys' dissolution decree, the wife was awarded a significantly larger portion of marital property than the husband, including sole ownership of the parties' 198 acre farm. On appeal, the husband's contention that the disproportionate distribution constituted "punishment" for his bigamous relationship was rejected; pursuant to Indiana Code section 31-1-11.5-11(b)(4), the bigamous relationship was viewed as conduct related to the dissipation of marital property. The court of appeals also rejected his assertion that the trial court improperly had attributed to him the entire fair market value of the property held jointly with his paramour. Employing a curious harmless error analysis, the court found that if such valuation had occurred, "it is of arguable detriment only to the wife for she received no portion of that property or its value."¹⁴⁸ That rationale is dubious, for it ignores the "one pot"

¹⁴⁴It should be recognized the trial court has two options by which to accommodate present value discounted: 1) an award of interest; or 2) an increase in the total monetary amount of the award commensurate to the decrease in present value which results from the deferred payment plan. In the latter instance, interest accrues on the unpaid balance once an installment is delinquent, unless the court dictates otherwise. *Van Riper v. Keim*, 437 N.E.2d at 130, 132 (Ind. Ct. App. 1982).

¹⁴⁵The standard again was criticized by the court of appeals during the survey period stating that "absent an error of law, we review the evidence and pronounce in conclusory terms that the court's decision was or was not an abuse of discretion." *Herron v. Herron*, 457 N.E.2d 564, 566 n.2 (Ind. Ct. App. 1983) (citing *Lord v. Lord*, 443 N.E.2d 847, 850-51 n.4 (Ind. Ct. App. 1982)).

¹⁴⁶453 N.E.2d 331 (Ind. Ct. App. 1983).

¹⁴⁷"[F]inal separation" is defined as "the date of filing of the petition for dissolution." IND. CODE § 31-1-11.5-11(a) (Supp. 1984).

¹⁴⁸453 N.E.2d at 335.

theory of distribution employed in Indiana property distribution.¹⁴⁹

Developments after final separation were the subject of *DeMoss v. DeMoss*,¹⁵⁰ where, subsequent to the filing of the parties' petition for dissolution, the husband acquired a significant debt in connection with his farming operation. At the final hearing, an objection to testimony regarding the husband's post separation farming expenses was sustained. In the trial court's findings, however, the husband was charged with responsibility for those farming debts. The wife appealed, arguing the trial court had erred by including the debts in the marital estate, thereby reducing the net marital estate and, in turn, the share of assets awarded to her. The court of appeals disagreed, finding the trial court's evidentiary ruling "clearly indicated that the 1981 debt would *not* be considered."¹⁵¹ *DeMoss* perpetuates the statutory principle that assets and debts incurred subsequent to the date of final separation are not subject to distribution as part of the marital estate.¹⁵² At the same time, it should be recognized that the farming debt was part of the statutory framework for the trial court's property disposition, for it bore on "[t]he economic circumstances of the spouse at the time the disposition of the property [was] to become effective."¹⁵³ In that respect, practitioners should not be misled by the *DeMoss* court's generic use of the term "consider"; absent fraud, a postfinal separation change of economic circumstances is relevant to the distribution of the marital estate.¹⁵⁴ The statutory factor bears particular import, of course, in cases where a significant lapse of time has occurred between filing and final hearing.

The rule may also have ramifications subsequent to final hearing, as revealed in the survey-period decision of *Showley v. Showley*.¹⁵⁵ There, following the final hearing and presentation of evidence regarding the marital assets, liabilities, and distribution thereof, the trial court implemented the forty-five day reconciliation period contained in Section 8¹⁵⁶ of the Dissolution of Marriage Act. Attempts at reconciliation apparently

¹⁴⁹The "one pot" theory, as explained in *In re Marriage of Dreftak*, 181 Ind. App. 651, 393 N.E.2d 773 (1979), prohibits the trial court from excluding from consideration and distribution any assets of the marriage; conversely, where a trial court awards property to a spouse which is not part of the marital "pot," its distribution is predicated on an incorrect value of the total marital estate. Where one spouse is "awarded" all of those nonmarital assets, the share of the actual marital estate awarded that spouse is smaller than that percentage or interest calculated by the trial court.

¹⁵⁰453 N.E.2d 1022 (Ind. Ct. App. 1983).

¹⁵¹*Id.* at 1025.

¹⁵²*See, e.g., Sadler v. Sadler*, 428 N.E.2d 1305 (Ind. Ct. App. 1981); *Irwin v. Irwin*, 406 N.E.2d 317 (Ind. Ct. App. 1980).

¹⁵³IND. CODE § 31-1-11.5-11(b)(3) (Supp. 1984). *See, e.g., Showley v. Showley*, 454 N.E.2d 1230 (Ind. Ct. App. 1983); *Irwin v. Irwin*, 406 N.E.2d 317, 320 n.3 (Ind. Ct. App. 1980).

¹⁵⁴IND. CODE § 31-1-11.5-11(b)(3) (Supp. 1984).

¹⁵⁵454 N.E.2d 1230 (Ind. Ct. App. 1983).

¹⁵⁶IND. CODE § 31-1-11.5-8 (Supp. 1984).

failed and, after an inexplicable delay of fifteen months, dissolution was granted and a property disposition decreed. The wife appealed, arguing the fifteen month lapse from presentation of evidence to entry of decree violated the mandate of the trial court to consider the economic circumstances of the parties at the time the disposition becomes effective. For the majority, Judge Shields invoked a waiver analysis, holding that “*if for any reason* the entry of the decree is delayed, it is reasonable to impose the obligation upon the parties to seek the opportunity to submit additional evidence on a change in circumstances occurring during the delay.”¹⁵⁷ The wife’s argument was rejected because she did not seek to reopen the case for additional evidence. *Showley* has obvious and potentially significant application to cases taken under advisement.

Showley also resurrected the court of appeals’ debate over the trial court’s responsibilities where parties have failed to introduce evidence as to the value of marital property. Relying on *In re Marriage of Church*,¹⁵⁸ the majority summarily rejected the wife’s contention that the trial court had erred by failing to act sua sponte to fill the evidentiary void regarding both the value of the marital property and the extent of each party’s contribution to its acquisition. Chief Judge Buchanan dissented, likening a trial court’s division of property without evidence of value to “depriving the carpenter of his hammer and saw or the bricklayer of his trowel.”¹⁵⁹ Because the distribution had involved real property of significant value, not susceptible to valuation by reference to “rules of thumb,” he argued for remanding the cause to determine the value of the property. Given the weaknesses inherent to Chief Judge Buchanan’s approach,¹⁶⁰ its minority status likely will remain such. According to *Church* and *Showley*, the duty to supply those evidentiary “tools” necessary to a knowledgeable distribution continues to rest on the parties.

4. *Post dissolution Attacks: Fraud and Misconduct.*—A final property disposition is subject to modification or revocation only in the event of

¹⁵⁷454 N.E.2d 1231 (emphasis added).

¹⁵⁸424 N.E.2d 1078 (Ind. Ct. App. 1981).

¹⁵⁹454 N.E.2d at 1233 (Buchanan, C.J., dissenting).

¹⁶⁰To be sure, the circumstances of any particular case may justify the trial court’s exercise of its inherent authority to require the submission of additional evidence. See, e.g., *Marsico v. Marsico*, 154 Ind. App. 436, 290 N.E.2d 99 (1974). Whether the trial court’s interposition into the adversarial process should be mandatory is another matter. Philosophical considerations aside, the question of *when* the duty would be triggered is problematic. For instance, Chief Judge Buchanan did not address wife *Showley*’s assertion that the trial court also erred by failing to elicit evidence regarding each party’s contribution to the acquisition of the property; that argument is not meritless, for Indiana Code section § 31-1-11.5-11(b) provides that the court “shall consider” that factor, as well as four other nonexclusive criteria specifically defined therein. In short, the would-be fact-seeking role of the trial court has potential for limitless expansion. Absent removal of marital dissolutions from the adversarial system, factual development should remain the burden of the parties.

fraud, which must be asserted within two years of the entry of the decree.¹⁶¹ The survey period saw this statute of limitations upheld as not violative of equal protection. Additionally, Trial Rule 60(B)(3) was recognized as an adjunct to the two year period.

The former ruling came in *In re Marriage of Murray*,¹⁶² where the court of appeals also rejected a contention that implementation of the two year period should be barred by the doctrine of equitable estoppel. In *Murray*, the wife's motion to set aside an alleged fraudulently-obtained property settlement and decree was dismissed because it had been filed over two years subsequent to final dissolution. On appeal, she asserted her husband should be estopped from reliance on the limitations period because of his overtures of reconciliation during the two year period. She maintained she had not considered the marriage ended or the property division final until the month ending the two year period, when her ex-husband forced her to vacate the home awarded to him in the final decree. Her equitable estoppel defense was rejected by the court of appeals, which found she lacked a right to rely on her former husband's representations and to ignore the legal effect of their divorce: "Our divorce laws are not designed to be employed as an experiment in creative marriage enhancement."¹⁶³

Meanwhile, in *Joachim v. Joachim*,¹⁶⁴ the court of appeals recognized that where postdissolution actions constitute "misconduct" and no fraud is involved, Trial Rule 60(B)(3) provides an alternative vehicle for challenging a disposition of marital property.¹⁶⁵

G. Paternity

1. *Limitations of Actions.*—Reverberations from the 1982 decisions in *Mills v. Habluetzel*¹⁶⁶ and *In re M.D.H.*¹⁶⁷ continued during the survey period, bringing predictable refinements to the law surrounding paternity statutes of limitations. In *Pickett v. Brown*,¹⁶⁸ the United States Supreme Court expanded the principles laid down in *Mills* to unanimously find that Tennessee's two year statutory period of limitations on paternity actions denied equal protection to children born-out-of-wedlock.¹⁶⁹ The

¹⁶¹IND. CODE § 31-1-11.5-17 (Supp. 1984).

¹⁶²460 N.E.2d 1023 (Ind. Ct. App. 1984).

¹⁶³*Id.* at 1026.

¹⁶⁴450 N.E.2d 121 (Ind. Ct. App. 1983).

¹⁶⁵A not uncommon postdissolution vindictiveness resulted in wife Joachim's refusal to cooperate in the sale of the marital residence. The relief granted to the husband was reversed because the trial court failed to conduct an evidentiary hearing on his petition as required by Trial Rule 60(B). 450 N.E.2d at 122.

¹⁶⁶456 U.S. 91 (1981).

¹⁶⁷437 N.E.2d 119 (Ind. Ct. App. 1982).

¹⁶⁸103 S. Ct. 2199 (1983).

¹⁶⁹*Id.* at 2206.

Pickett decision vindicates the Indiana appellate court's decision in *M.D.H.* that the two year statute of limitations formerly applicable in Indiana¹⁷⁰ was constitutionally invalid. Moreover, the two courts' analyses run parallel in concluding that a two year period "does not provide certain illegitimate children with an adequate opportunity to obtain support and is not substantially related to the legitimate state interest in preventing the litigation of stale or fraudulent claims."¹⁷¹

The retroactive effect of these constitutional rulings was at issue in *R.L.G. v. T.L.E.*,¹⁷² where, in 1981, minor child T.L.E. brought suit by her next friend to establish her paternity. In effect at the time of her birth in 1975 was the two year limitations ultimately struck down in *M.D.H.* Putative father R.L.G. filed a motion to dismiss T.L.E.'s action on the basis of the two year statute of limitations. The motion was granted, but T.L.E.'s subsequent motion to correct errors was granted and the cause reinstated.¹⁷³ The putative father appealed, arguing the trial court had erred by giving retroactive force to the twenty year period of limitations which took effect October 1, 1979.¹⁷⁴ He maintained that as of 1977, two years subsequent to T.L.E.'s birth, he had acquired a vested property right of absolution from T.L.E.'s support, precluding resurrection of the obligation. The court of appeals rejected his contentions, finding that the twenty year period for illegitimate children had not created or eliminated any existing rights, but rather provided another remedy for the enforcement of those rights.¹⁷⁵ The court buttressed its distinction with reliance on the principle that rights cannot accrue under an unconstitutional statute.¹⁷⁶ Given the remedial nature of the 1979 legislation and the *M.D.H.* holding, the trial court's reinstatement of T.L.E.'s paternity action was upheld.

2. *Hampton v. Douglass: Default Judgments and Retroactive Support Orders.*—The use of default judgments in paternity actions was unequivocally rejected in the survey-period decision of *Hampton v. Douglass*.¹⁷⁷

¹⁷⁰IND. CODE § 31-4-1-26 (1974), repealed by Act of Mar. 10, 1978, Pub. L. No. 136, § 57, 1978 Ind. Acts 1196, 1286.

¹⁷¹103 S. Ct. at 2209. *Accord In re M.D.H.*, 437 N.E.2d at 129.

¹⁷²454 N.E.2d 1268 (Ind. Ct. App. 1983).

¹⁷³The motion to correct errors was predicated on two bases: 1) the unconstitutional nature of the prior statute of limitations, and 2) the applicability of the paternity statute adopted in 1978. The trial court did not state which argument prompted its ruling. 454 N.E.2d at 1269.

¹⁷⁴IND. CODE § 31-6-6.1-6(b) (Supp. 1984).

¹⁷⁵454 N.E.2d at 1270 (relying on *Malone v. Conner*, 135 Ind. App. 167, 189 N.E.2d 590 (1963)). See also *Tarver v. Dix*, 421 N.E.2d 693 (Ind. Ct. App. 1981) (retroactive application of paternity statute).

¹⁷⁶454 N.E.2d at 1271 (citing *Oolitic Stone Co. of Indiana v. Ridge*, 174 Ind. 558, 91 N.E. 944 (1910)).

¹⁷⁷457 N.E.2d 618 (Ind. Ct. App. 1983). For a criticism of this case, see Harvey, *Civil Procedure and Jurisdiction, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 91, 114 (1985).

Following the putative father's failure to appear for the paternity hearing, the natural mother in *Hampton* sought and was granted a default judgment on the issue of paternity. Evidence concerning attorney fees and support was then introduced and the trial court awarded the mother natal expenses, attorney fees, prospective support, and arrearages for support from the date of birth to the date paternity was established. The putative father's motion for relief from judgment was denied, and he appealed. Notwithstanding alternative procedural bases for its decision, the court of appeals analogized paternity actions to divorce and custody matters¹⁷⁸ and concluded that default judgments as defined in Indiana are not appropriate in paternity actions for two reasons: 1) no responsive pleading is required in paternity actions;¹⁷⁹ and 2) the determination of paternity is a matter of grave importance which engages the *parens patriae* interests of the state.¹⁸⁰ Accordingly, the cause was remanded for further proceedings.

Putative father Hampton also challenged the propriety of the trial court's award of retroactive support. Without addressing his specific contentions, the court of appeals summarily observed in a footnote¹⁸¹ that, pursuant to *B.G.L. v. C.L.S.*,¹⁸² "this court's position is clear that the duty of a father to maintain his minor children is imposed by law beginning at birth."¹⁸³ This dictum represents an unfortunate rush to judgment; the statutory language which figured so significantly in the *B.G.L.* determination has been repealed and replaced with dissimilar terms.¹⁸⁴ Notwithstanding the short shift given putative father Hampton's due process right to be heard,¹⁸⁵ it remains that a natural mother should

¹⁷⁸*In re Marriage of Henderson*, 453 N.E.2d 310 (Ind. Ct. App. 1983) (modification of custody without evidentiary basis improper); *Scherer v. Scherer*, 405 N.E.2d 40 (Ind. Ct. App. 1980) (dissolution of marriage via summary procedures improper).

¹⁷⁹457 N.E.2d at 620 (citing *Roe v. Doe*, 154 Ind. App. 203, 289 N.E.2d 528 (1972)). Consequently, the default judgment is not necessary in paternity proceedings for the purpose of preventing delay. Rather, the petitioner may proceed directly to the presentation of evidence and, in the absence of the respondent, obtain judgment.

¹⁸⁰457 N.E.2d at 260. Evidence is necessary to establish that the best interests of the child have been and will be served. *See, e.g., D.R.S. v. R.S.H.*, 412 N.E.2d 1257 (Ind. Ct. App. 1980); *Stevenson v. Stevenson*, 173 Ind. App. 495, 364 N.E.2d 161 (1977).

¹⁸¹457 N.E.2d at 621 n.2.

¹⁸²175 Ind. App. 132, 369 N.E.2d 1105 (1977).

¹⁸³457 N.E.2d at 621 n.2.

¹⁸⁴The statutory language relied on in *B.G.L.* included provisions permitting the wife to "recover" child support in an amount not more than "two [2] years accrued support furnished prior to the bringing of the action." IND. CODE §§ 31-4-1-3, -26 (1973), repealed by Act of Mar. 10, 1978, Pub. L. No. 136, § 57, 1978 Ind. Acts 1196, 1286. No express language pertaining to a retroactive support obligation is contained in the present Paternity Act. *See* IND. CODE §§ 31-6-6.1-1 to -19 (1982 & Supp. 1984).

¹⁸⁵Given that the statutory bases for the *B.G.L.* decision had been repealed, it is axiomatic the court of appeals should have either abstained from reaching the question or reached its merits. As it is, Hampton's opportunity to be heard on remand was unnecessarily clouded by the court's dicta.

be eligible for a support order made retroactive to the date of the child's birth. As succinctly stated in *Denny v. Star Publishing Company*:¹⁸⁶

The duty of a father to provide for the maintenance of his minor children is a principle of natural law. The obligation of progenitors to support their offspring is universally acknowledged. To discharge this duty is a primal instinct of human nature. *The duty is imposed by law at least as early as at the birth of a child* and continues thereafter until legally terminated.¹⁸⁷

This jurisprudential approach is also supported by less lofty considerations. The existing Paternity Act provides that the natural mother may recover the necessary expenses of her "pregnancy and childbirth, including the cost of prenatal care, delivery, hospitalization, and postnatal care."¹⁸⁸ It is doubtful the legislature intended to deprive a mother of reimbursement for support rendered from birth to determination of paternity, given the statutory award of natal expenses predating weekly support expenses. That conclusion is further supported by the fact that the state's interest in reimbursement for past public assistance rendered may be at stake.¹⁸⁹ It has also been recognized that a delay in initiating paternity proceedings is often attributable to human tendencies¹⁹⁰ or gamesmanship;¹⁹¹ again, the economic circumstances of the minor child should not suffer from these actions of the parents. Indeed, equal protection guarantees arguably might preclude the denial of retroactive support to illegitimate children.¹⁹² For all these reasons, the rule of *B.G.L.* should remain intact despite the changes in the statutory language underlying that precedent.

¹⁸⁶94 Ind. App. 300, 180 N.E. 685 (1932).

¹⁸⁷*Id.* at 307-08, 180 N.E. at 687 (emphasis added) (citations omitted).

¹⁸⁸IND. CODE § 31-6-6.1-17 (1982).

¹⁸⁹IND. CODE § 12-1-7-1.1 (1982). *See also* Pickett v. Brown, 103 S. Ct. at 2204; D.R.S. v. R.S.H., 412 N.E.2d 1257, 1261 (Ind. Ct. App. 1980).

¹⁹⁰Justice Rehnquist observed in *Mills v. Habluetzel*, 456 U.S. at 100:

Financial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within 12 months of birth.

¹⁹¹*See, e.g.,* Unwed Father v. Unwed Mother, 177 Ind. App. 237, 379 N.E.2d 467 (1978) (difficulties of parents of children born out of wedlock).

¹⁹²*See* Pickett v. Brown, 103 S. Ct. at 2206-09.

VII. Evidence

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A. Hearsay

1. *Patterson Revisited*.—As in previous years,¹ the rule enunciated in *Patterson v. State*² continued during this survey period to be a focus of attention in the appellate courts. The *Patterson* rule permits the admission, as substantive evidence, of extrajudicial statements of witness-declarants who are present and available for cross-examination.³

The Indiana Supreme Court, in *Watkins v. State*,⁴ recently fashioned a limitation upon the *Patterson* rule but is apparently loathe to apply it. In *Watkins*, the court dealt with the issue of a witness-declarant who either denies making a prior statement or denies any memory of doing so. Two codefendants⁵ challenged the admissibility as substantive evidence of prior statements by a witness-declarant who vacillated at trial regarding her memory of the statements. The court agreed with their contentions and limited the *Patterson* rule by holding “that when the witness (out-of-court declarant) denies having made the statement in question or denies having any memory of having done so, the statement is inadmissible as substantive evidence, because it obviously cannot be then cross-examined.”⁶ However, whether the witness-declarant has denied making the statement, professed no memory of it, or admitted it is to be determined by the trial court from “all of [the witness-declarant’s] testimony and not merely from isolated bits and pieces.”⁷ Applying that

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¹See generally Tanford, *Evidence, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 197, 198-202 (1984); Karlson, *Evidence, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 191, 191-94 (1983); Karlson, *Evidence, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 227, 227-30 (1982).

²263 Ind. 55, 324 N.E.2d 482 (1975).

³*Id.* at 58, 324 N.E.2d at 484-85.

⁴446 N.E.2d 949 (Ind. 1983).

⁵Watkins, Warner, and Smith were codefendants in the trial court. Their appeals, filed separately, were consolidated for the court’s convenience. *Id.* at 952.

⁶*Id.* at 960.

⁷*Id.* In this regard, the standard to be applied on appellate review is tantamount to that applied whenever the appellate courts are called upon to review any challenge to the sufficiency of evidence; that is, the court will neither reweigh the evidence nor judge the credibility of the witness. *E.g.*, *Robinson v. State*, 266 Ind. 604, 365 N.E.2d 1218 (1977).

standard, the court found the statements to be admissible as substantive evidence because the witness-declarant's equivocal testimony could properly have been regarded by the trial court as a memory lapse or lack of knowledge regarding the actual events in question rather than a denial of or a failure to recall her out-of-court declarations.⁸

In *Crafton v. State*,⁹ the court recognized the *Patterson* rule as "modified"¹⁰ by *Watkins* but nevertheless determined that an extrajudicial statement was admissible. While the purpose for introducing the prior statement by the witness-declarant was unclear, the court found no reversible error even if admitted as substantive evidence because it was within the trial court's purview, due to its "superior position"¹¹ of being able to observe the witness-declarant, to resolve any conflicts regarding his memory of the statement in question.¹² The prior statements of two other witness-declarants may have been inadmissible under *Watkins*, but those "statements were nonetheless entitled to the same probative effect afforded to otherwise competent evidence since counsel failed to object."¹³

It thus appears that a witness-declarant must either make an unequivocal denial of the prior statement or profess absolutely no memory of it before the limitation imposed by *Watkins* will have any practical effect. The prior statement will nevertheless be admissible for impeachment purposes,¹⁴ though with an admonishment or limiting instruction that it should be considered only as such. Such an admonishment or instruction is of "questionable value"¹⁵ because it requires that jurors compartmentalize their minds whenever evidence is admissible for one purpose but not another.¹⁶ Counsel is therefore confronted with the ageless and difficult to verify but still troublesome proposition that jurors may make inappropriate use of the prior statement.

The Indiana Supreme Court, in *Brewster v. State*,¹⁷ declined to extend *Patterson* to the situation in which a witness refuses to testify.¹⁸ In *Brewster*, the defendant's brother (the witness-declarant) was an eye-witness to the shooting with which Brewster was charged. The witness-

⁸446 N.E.2d at 960-01.

⁹450 N.E.2d 1042 (Ind. Ct. App. 1983).

¹⁰*Id.* at 1054.

¹¹*Id.* at 1052.

¹²*Id.*

¹³*Id.* at 1055 (citation omitted).

¹⁴*Samuels v. State*, 267 Ind. 676, 372 N.E.2d 1186 (1978).

¹⁵*Id.* at 679, N.E.2d at 1187.

¹⁶*See* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 59 at 135-36, § 251 at 603-04 (2d ed. 1972).

¹⁷450 N.E.2d 507 (Ind. 1983).

¹⁸*See also* LaBine v. State, 447 N.E.2d 592 (Ind. 1983) (Although witness-declarant's loss of memory and assertion of fifth amendment privilege made him unavailable for cross-examination, there was no error in the admission of his prior statement where the jury was instructed to consider it only for purposes of impeachment.).

declarant gave a statement to the police shortly after the incident. When called at trial, he merely identified his brother and then refused, even under court order, to testify further.¹⁹ The contents of the prior statement were related to the jury by the detective who took the statement, and the witness-declarant was then recalled by the trial court for purposes of cross-examination upon the contents of the statement. While never specifically asked about the statement, he indicated, in response to defense counsel's questioning, that he would continue to refuse to testify. While the admission of the contents of the statement was found to be harmless error in view of its corroboration by other properly admitted evidence, the court stated:

We question the extension of the *Patterson* rule, however, to an incident such as the one in the instant case where the witness giving the statement, neither admitting nor denying that he did give it, refuses to testify and makes it apparent to all that he will not testify under any circumstances. The witness cannot be considered available for cross-examination under such circumstances and this was shown when the defendant did, in fact, call him for cross-examination.²⁰

The court in *Brewster* distinguished another recent decision, *Rapier v. State*,²¹ in which the witness-declarant's prior statement was held admissible under *Patterson*. In *Rapier*, the witness-declarant, who was neither a codefendant nor an accomplice, asserted an invalid fifth amendment privilege. The witness-declarant admitted making the prior statement but repudiated its trustfulness and stated that he had been coerced when making the statement. The *Brewster* court distinguished *Rapier* on that basis.²²

Although it has been suggested that the posture of the witness-declarant in *Rapier* "made cross-examination practically impossible,"²³ contrasted to the situation in *Brewster*, the witness-declarant was arguably available for cross-examination concerning his prior statement as he did not completely refuse to give direct testimony regarding it. It should also be noted that under circumstances similar to those in *Rapier*, the United States Supreme Court has stated that cross-examination may well be "futile."²⁴

¹⁹450 N.E.2d at 508. The witness-declarant did not assert a fifth amendment privilege.

²⁰*Id.* at 510.

²¹435 N.E.2d 31 (Ind. 1982).

²²450 N.E.2d at 509-10.

²³Tanford, *supra* note 1, at 200.

²⁴*Nelson v. O'Neil*, 402 U.S. 622, 629 (1971). The Court stated, "For once [the witness-declarant] had testified that the [prior] statement was false, it could hardly have profited the respondent for his counsel through cross-examination to try to shake that testimony." *Id.*

Close reading of *Brewster* and *Rapier* discloses an additional, although somewhat inconspicuous, factor of which notice should be taken: the attempt, or lack thereof, by counsel to cross-examine the witness-declarant. The court, in *Brewster*, noted that counsel attempted to cross-examine the witness-declarant,²⁵ but counsel in *Rapier* did not,²⁶ although that witness-declarant may have been amenable to cross-examination.²⁷ It may therefore be inferred that counsel should attempt to cross-examine a witness-declarant before a *Patterson* challenge will be favorably received upon appellate review.

2. *Child Hearsay in Crimes Against Children*.²⁸—A recently enacted statute creates, under specific circumstances, an exception to the hearsay rule for the extrajudicial statements of certain child-declarants who allegedly have been the victims of child molesting, battery, kidnapping, or confinement.²⁹ The statute provides for the admission into evidence

²⁵450 N.E.2d at 508, 510.

²⁶435 N.E.2d at 33.

²⁷*Id.* at 35. The court stated, "The attitude and testimony of the witness indicated that he may have responded to cross-examination by the defendant if an attempt had been made." *Id.*

²⁸The following is not intended to be an exhaustive analysis of a topic that will undoubtedly be the subject of substantive litigation and comment in the future.

²⁹Act of Mar. 1, 1984, Pub. L. No. 180-1984, 1984 Ind. Acts 1488 (codified at IND. CODE § 35-37-4-6 (Supp. 1984)).

The statute provides:

- (a) This section applies to criminal actions for the following:
 - (1) Child molesting (IC 35-42-4-3).
 - (2) Battery upon a child (IC 35-42-2-1(2)(B)).
 - (3) Kidnapping (IC 35-42-3-2).
 - (4) Confinement (IC 35-42-3-3).
- (b) A statement that:
 - (1) is made by a child who was under ten (10) years of age at the time of the statement;
 - (2) concerns an act that is a material element of an offense listed in subsection (a) that was allegedly committed against the child; and
 - (3) is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in a criminal action for an offense listed in subsection (a) if the requirements of subsection (c) are met.
- (c) A statement described in subsection (b) is admissible in evidence in a criminal action listed in subsection (a) if, after notice to the defendant of a hearing and of his right to be present:
 - (1) the court finds, in a hearing:
 - (A) conducted outside the presence of the jury
 - (B) attended by the child;
 that the time, content, and circumstances of the statement provide sufficient indications of reliability; and
 - (2) the child:
 - (A) testifies at the trial; or
 - (B) is found by the court to be unavailable as a witness because:
 - (i) a psychiatrist has certified that the child's participation in

of a prior statement, not otherwise admissible under court rule or statute, by a child under the age of ten at the time of the statement. The statement must concern an act that is a material element of the offense charged; it may be admitted, after a hearing conducted outside the presence of the jury, if the trial court finds that the "time, content, and circumstances" of the statement indicate it is sufficiently reliable.³⁰ If the child is unavailable to testify,³¹ the statute requires corroboration of the act. The prosecuting attorney must give notice to the defendant of the intent to introduce the statement within a time frame sufficient to permit preparation of a response.³²

Indiana, in enacting this law, has apparently followed the lead of Washington which recently enacted a similar provision.³³ There are, however, distinctions between the laws: the Washington statute is limited

the trial would be a traumatic experience for the child;

(ii) a physician has certified that the child cannot participate in the trial for medical reasons; or

(iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

(d) If a child is unavailable to testify at the trial for a reason listed in subsection (c)(2)(B), a statement may be admitted in evidence under this section only if there is corroborative evidence of the act that was allegedly committed against the child.

(e) A statement may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney of:

- (1) his intention to introduce the statement in evidence; and
- (2) the content of the statement;

within a time that will give the defendant a fair opportunity to prepare a response to the statement before the trial.

³⁰IND. CODE § 35-37-4-6(c)(1) (Supp. 1984).

³¹By this provision, the statute addresses the situation where the *Patterson* rule is not applicable; that is, where the child is not to be available as a witness at trial.

³²IND. CODE § 35-37-4-6 (Supp. 1984).

³³WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1984-85) provides:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

in its application to charges involving sexual abuse, and it fails to even attempt to define when a child is "unavailable."³⁴

The foundations of necessity and reliability serve as the rationale for any exception to the hearsay rule.³⁵ The obvious concern is whether or not the new statute adequately addresses these foundational principles while sufficiently protecting the defendant's rights under the confrontation clause.³⁶

Indiana Code section 35-37-4-6 is clearly designed to address the problems generally believed to be inherent in the prosecution of certain offenses against children; that is, the possible necessity for the prior statement arises from the unique circumstances often considered attendant to such crimes. Children are generally believed, correctly or not, to be poor witnesses due to their inferior memories; their fear of the defendant, the courtroom setting, and the attorneys; and their suggestability. In sex abuse cases, additional necessity may be created by the lack of other witnesses and the lack of corroborative physical evidence.³⁷

Proponents of such an approach assert that trustworthiness of the prior statement is guaranteed because the trial court is required to examine not only the content of the prior statement but the circumstances surrounding it. Thus it is asserted that the trial court's consideration of such factors as the child's age and mental capacities; social and scholastic achievements; relationships, including any to the defendant; threats; spontaneity; language employed; and corroborative evidence ensures the reliability of a prior statement.³⁸ Finally, it has been argued that such a statute protects the defendant because it allegedly surpasses constitutional requirements and safeguards.³⁹

It would appear, however, that Indiana Code section 35-37-4-6 has infirmities. It is not limited to charges involving sexual abuse, and it is doubtful that necessity for such prior statements is of paramount interest in the other enumerated crimes. While sex abuse rarely occurs in the presence of other persons, the same is not necessarily true for the other crimes of battery, kidnapping, and confinement. Thus, it is far more likely that there may be other witnesses and corroborative evidence in a case involving any of those crimes. That corroboration is required when the child is to be unavailable at trial is an apparent attempt to ensure a higher degree of trustworthiness to the prior statement. The

³⁴*Id.*

³⁵See 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1420 (1st ed. Supp. 1974).

³⁶U.S. CONST. amend. VI.

³⁷Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1749-51 (1983).

³⁸*Id.* at 1758, 1761-62.

³⁹*Id.* at 1766. In *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), the Court held that hearsay, to be admissible, must be marked by sufficient "indicia of reliability."

statute, however, calls for “corroborative evidence of the act,”⁴⁰ not corroboration of the child’s prior statement. Unless the defendant is a relative or other person well-known to the child, the requirement of corroboration does not lend any reliability to the prior statement as it concerns identity.⁴¹

The statute is vague in several respects, especially as it relates to the child’s unavailability due to medical reasons, either physical or emotional. One unanswered question is whether the physician who certifies that the child cannot participate in the trial is to be one chosen by the child’s parents or one chosen by the trial court. Also left unanswered is whether, in either situation, the defendant will be permitted to have his own expert examine the child.

The vagueness is not limited to that section of the statute dealing with unavailability due to medical reasons. It is noteworthy that while the statute calls for both a hearing at which the child is present and an opportunity for the defense to prepare a response to the prior statement, it is not clear that either requirement will afford the defendant any meaningful opportunity for cross-examination.

Finally, the statute may permit the admission into evidence of the prior statement of an otherwise incompetent witness as it provides that a child may be found to be unavailable to testify at trial if the child is “incapable of understanding the nature and obligation of an oath.”⁴² While the actual oath may not be critical,⁴³ it is arguable that the child, under this new law, would not be required to demonstrate any obligation to be truthful. The law would thus permit the use of a prior statement, that due to extrinsic factors appears to be trustworthy,⁴⁴ in lieu of the presence of a child who is too unreliable to be permitted to testify at trial.⁴⁵ This clearly conflicts with the premise that any exception to the hearsay rule must be predicated, at least in part, upon a foundation of trustworthiness or reliability. If the child is a poor witness because he

⁴⁰IND. CODE § 35-37-4-6(d) (Supp. 1984).

⁴¹Note, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L. REV. 387, 402 (1983).

⁴²IND. CODE § 35-37-4-6 (c)(2)(B)(iii) (Supp. 1984). Compare IND. CODE § 34-1-14-5 (1982) which provides that children under the age of ten are incompetent as witnesses “unless it appears that they understand the nature and obligation of an oath.” Under this provision, any determination concerning the competency of a child under the age of ten has been left to the discretion of the trial court. It is still necessary, however, that the trial court determine that the child is able to understand the difference between the truth and a lie and feel a compulsion to tell the truth. *E.g.*, *Bowers v. State*, 435 N.E.2d 309, 310 (Ind. Ct. App. 1982).

⁴³J. WIGMORE, *supra* note 35, § 10 (oath is merely concomitant to cross-examination and not a fundamental justification for hearsay rule).

⁴⁴See *supra* text accompanying note 38.

⁴⁵Note, *supra* note 41, at 392.

or she feels no compulsion to be truthful, there will be no incentive to produce the child at trial.⁴⁶

3. *Business Records.*—*a. Police accident reports.*—The business records exception, one of Indiana's well-recognized and more important exceptions⁴⁷ to the hearsay rule, remained unmodified despite an attempt this survey period to have a police accident report containing statements by witnesses admitted into evidence in *State v. Edgman*.⁴⁸ The Indiana Court of Appeals reaffirmed the rule requiring both the maker of the business record and the informant to be under a business duty to report before a business record is admissible under that exception.⁴⁹

Although an accident report prepared by a law enforcement officer qualifies as a business record,⁵⁰ the report is unique because it commonly contains statements taken from witnesses during the officer's investigation regarding the incident which the officer did not witness. Unlike employees in the true business scenario from whom statements are taken and incorporated in the report made by a supervisor or records keeper,⁵¹ the witness of an accident is not under a business duty to observe and report the facts of the accident. Thus, admitting into evidence a report containing these statements of questionable veracity would contravene the premise of the exception.⁵²

⁴⁶*Id.* at 401.

⁴⁷See *Herman v. State*, 247 Ind. 7, 210 N.E.2d 249 (1965), *cert. denied*, 384 U.S. 918 (1966); *Polus v. Conner*, 92 Ind. App. 465, 176 N.E. 234 (1931); *J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co.*, 54 Ind. App. 401, 118 N.E. 360 (1918); *Marks v. Box*, 54 Ind. App. 487, 103 N.E. 27 (1913); *Indianapolis Outfitting Co. v. Cheyne Electric Co.*, 52 Ind. App. 153, 100 N.E. 468 (1913).

⁴⁸447 N.E.2d 1091 (Ind. Ct. App. 1983), *transfer denied*, July 7, 1983.

⁴⁹*Id.* at 1103. Indiana embraces the business records exception by common law. For documents to qualify under the common law rule, the following requirements must be met:

- 1) The records offered must have been the original entries;
- 2) They must have been made in the regular course of business at or near the time of the event recorded;
- 3) The facts must have been within the first hand knowledge of someone whose business duty it was to observe and report the facts;
- 4) The witness who had knowledge of the facts must be unavailable.

Wells v. State, 254 Ind. 608, 615, 261 N.E.2d 865, 870 (1970). Indiana has modified these common law dictates slightly and no longer requires the witness who had knowledge of the facts to be unavailable. See *Burger Man, Inc. v. Jordan Paper Products*, 170 Ind. App. 295, 352 N.E.2d 821 (1976).

⁵⁰The term "business" is broadly construed. See *Herman v. State*, 247 Ind. 7, 210 N.E.2d 249 (1965) (a document from gambling operations which was record of payoffs to bribed police officers was admissible as business record).

⁵¹*State v. Estate of Stephens*, 426 N.E.2d 116 (Ind. Ct. App. 1981) (personal knowledge of transaction by record-keeper not necessary under business records exception to hearsay rule where record keeper made entry in routine course of business based on information reported by other employees acting in regular course of business who did have personal knowledge of transaction).

⁵²The exception to the hearsay rule for business records is based upon the fact that

In *Edgman*, the State offered an accident report prepared by an officer who did not witness the accident and thus had no first hand knowledge of the exact place where the car collided. Based upon the officer's investigation, however, information concerning the nature and location of the accident was filed in the officer's report.⁵³ Due to the officer's death in 1971, another officer who conducted a followup investigation at the hospital, but who also did not witness the accident, acted as the sponsor for the report during his direct examination.⁵⁴ The trial court refused admission of the report under the business records exception to the hearsay rule and the Indiana Court of Appeals affirmed the ruling.

In its entirety, the report contained significant information which was not based on the personal observations of the preparer of the report. Moreover, the information in the report was apparently supplied by persons who were not under a business duty to observe and report the facts of the accident. Recognizing the exception's requirements were designed to ensure the veracity of statements contained within the records, the court of appeals held that the requirements were not satisfied by the police report, and thus the report was not within the business records exception.⁵⁵

the circumstances of preparation assure the accuracy and the reliability of the entries. See C. McCORMICK, *supra* note 16, § 306. The heart of the rule is the requirement that the observation, reporting, and recording of the facts all be made by someone in the regular course of business. *Wells v. State*, 254 Ind. 608, 616, 261 N.E.2d 865, 870 (1970).

⁵³447 N.E.2d at 1103. The report did not indicate whether the officer's conclusions as to the nature of the accident were based upon witnesses listed in the report or other unidentified sources. *Id.* at 1103 n.10.

⁵⁴*Id.* at 1102. Although the officer did not identify himself as the custodian of the record—a requirement of admission under the business records exception, see *Darnell v. State*, 435 N.E.2d 250 (Ind. 1982)—*Edgman*'s counsel stipulated the report was a true and accurate copy of the report as found in the Gary Police Department files. 447 N.E.2d at 1103 n.9.

⁵⁵447 N.E.2d at 1104. Although the report in its *entirety* may have been inadmissible, certainly portions of it which did not rely on information gleaned from others would not have been hearsay and were therefore admissible. See *Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970) where the court held portions of a police memorandum showing time, date, log number, case number, and the fact a telephone conversation occurred (but not the substance of the conversation) were admissible although the report in its entirety contained hearsay. In *Edgman*, the State asked, in the alternative, for the court to permit the report's sponsor to read certain portions. Those portions related to the posted speed at the accident site, lane markings, and the location of the accident. 447 N.E.2d at 1102. The court of appeals concluded that the trial court did not err in refusing the request. The officer was properly prevented from testifying through the record as to the location of the accident for the same reason the entire record was inadmissible: the recording officer did not have personal knowledge and the narrative account of the accident was either hearsay or the opinion and conclusions of the officer and therefore inadmissible. *Id.* at 1105. In addition, although the officer could have read those portions dealing with the posted speed and lane markings as they were not subject to the taint of hearsay, no

b. Hospital Records.—*Fendley v. Ford*⁵⁶ offers an extensive footnote⁵⁷ which reviews the law concerning the admissibility of hospital records. Although hospital records are admissible in Indiana under the business records exception,⁵⁸ the Indiana Court of Appeals noted that not every item within the record is automatically admissible.

Two factors generally affect the admissibility of entries in hospital records: 1) whether or not the entry is medically germane to the treatment, and 2) whether the entry is one of fact or opinion.⁵⁹ Judge Shields noted two areas in which the application of these factors remains unsettled. First, Indiana has not yet addressed whether the medical entry, as opposed to a mere bookkeeping entry, is required to be germane to the treatment, medical history, or diagnosis of the patient.⁶⁰ The second question, whether the entry of blood alcohol tests or similar diagnostic tests is a fact or an opinion, is an issue which has received differing treatment in other jurisdictions.⁶¹

The court in *Fendley* was not required to develop a holding concerning either area of the law because of the resolution of the case based on the lack of chain of custody.⁶² Nonetheless, the footnote is instructive in its overview of hospital records under the business records exception.

B. Physical Evidence

1. Use of Dolls in Sex Abuse Cases.—In *Newton v. State*,⁶³ the court upheld the use, both before and during trial, of an anatomically correct doll by a seven-year-old victim of child molestation and incest. The court concluded, however, that any pretrial preparation which included the use of the doll was a “factor properly considered in determining her credibility.”⁶⁴

reversible error was committed when the trial court excluded the testimony because the evidence would have merely corroborated other evidence. *Id.*

⁵⁶458 N.E.2d 1167 (Ind. Ct. App. 1984).

⁵⁷*Id.* at 1170 n.3.

⁵⁸*Id.* at 1171 n.3 (citing *State v. Estate of Stephens*, 426 N.E.2d 116 (Ind. Ct. App. 1981); IND. CODE §§ 34-3-15.5-1 to -4 (1982)).

⁵⁹458 N.E.2d at 1171 n.3.

⁶⁰*Id.*

⁶¹*Id.* Jurisdictions differ in whether the test results are admissible as “fact” or whether an additional foundation is required before the results are admissible. Compare *Commonwealth v. Seville*, 266 Pa. Super. 587, 405 A.2d 1262 (1979) (results of diagnostic tests are admissible as “fact”) with *Wadena v. Bush*, 305 Minn. 134, 232 N.W.2d 753 (1975) (a showing of some additional foundation required before test results will be admitted).

⁶²See *infra* text accompanying note 89.

⁶³456 N.E.2d 736 (Ind. Ct. App. 1983).

⁶⁴*Id.* at 742.

On appeal Newton argued that the child's use of the doll at trial was unnecessary and that her pretrial practice with the doll denied him his due process rights to cross-examine and confront her. The court quickly disposed of the former contention, but found the latter to be "creative" because Newton analogized the child's pretrial preparation with the doll to hypnotically enhanced testimony.⁶⁵ That analogy, while found to be inapposite, was treated at some length.

The court correctly distinguished hypnotically influenced testimony from testimony theoretically aided by pretrial preparation.⁶⁶ Most significantly, the court recognized the differing rationales underlying hypnosis and pretrial preparation.⁶⁷ Hypnosis is used to refresh memory or increase recollection, and it thus produces testimony based upon a revived memory. Pretrial preparation, including practice with a doll, is used to aid a witness in articulating his or her own recollection and is not intended to change the witness' memory. Additionally, pretrial preparation raises no questions involving scientific accuracy while such questions do surround hypnotically induced testimony.⁶⁸ Finally, the court recognized that while there may be some suggestivity inherent in pretrial preparation, it is not at all like the "hypersuggestibility"⁶⁹ that may result when a witness is hypnotized.⁷⁰

2. *Photographs Taken by Automatic Cameras.*—The "silent witness theory" which permits the use of photographs as substantive, rather than merely demonstrative, evidence was first adopted in Indiana in *Bergner v. State*.⁷¹ Under this theory it is not necessary that a witness identify a photograph as an accurate representation of what he or she observed.⁷² Until recently, all decisions under the silent witness theory concerned Polaroid photographs.⁷³ In those decisions, a sufficient foundation was demonstrated where there was expert testimony that the photographs had not been altered and an approximate date that the photographs had been taken was established.⁷⁴

⁶⁵*Id.* at 741.

⁶⁶Pretrial meetings with witnesses are recognized as an integral part of the preparation of a case for trial. C. McCORMICK, *supra* note 16, § 2, at 2.

⁶⁷456 N.E.2d at 742.

⁶⁸See generally Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, 17 TRIAL 56 (Apr. 1981).

⁶⁹*Id.* at 56.

⁷⁰456 N.E.2d at 742.

⁷¹397 N.E.2d 1012 (Ind. Ct. App. 1979), *transfer denied*, July 1, 1980.

⁷²*Id.* at 1015.

⁷³*Buck v. State*, 453 N.E.2d 993 (Ind. 1983); *Torres v. State*, 442 N.E.2d 1021 (Ind. 1982); *Bergner v. State*, 397 N.E.2d 1012 (Ind. Ct. App. 1979) *Buck* and *Torres* were charged as codefendants.

⁷⁴In *Bergner* the approximate date of the photographs was established by the child-victim's appearance in the photographs and the dates of manufacture of the film. 397

During this survey period, the Supreme Court of Indiana, in *Groves v. State*,⁷⁵ dealt for the first time with the admission, under the "silent witness theory," of photographs taken by automatic cameras. The court reaffirmed the *Bergner* principle that the determination whether or not an adequate foundation for the admission of photographs under the "silent witness theory" has been established is committed to the discretion of the trial court and will be reviewed only for abuse of that discretion.⁷⁶ The *Groves* court, however, recognized the nonmandatory guidelines for photographs taken by automatic cameras as set out in *Bergner*:

"In cases involving photographs taken by automatic cameras, such as Regiscopes or those found in banks, there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera."⁷⁷

Because there was no evidence introduced concerning the processing of the film, the court held the photographs were improperly admitted. *Groves*' conviction was reversed because the photographs, coupled with an improper identification made from them, counterbalanced any properly admitted evidence.⁷⁸

3. *Chain of Custody*.—Two recent cases stressed the need to establish a proper chain of custody for body specimens taken from a person for testing in a laboratory. In *Baker v. State*,⁷⁹ and *Fendley v. Ford*,⁸⁰ body specimens were sent to a laboratory for testing, and the test results were then entered in a medical record. At the trial in each cause, the medical records were offered as exhibits and would have been properly admissible⁸¹ had a proper chain of custody been established for the specimens.

N.E.2d at 1018. In *Torres* the mother of the child-victim was familiar with the defendants' apartment and was able to recall the approximate date on which the child was alone with the defendants. *Torres v. State*, 442 N.E.2d 1021, 1023, 1025 (Ind. 1982). The same approximation was held to be sufficient in *Buck*. *Buck v. State*, 453 N.E.2d 993, 995-96 (Ind. 1983).

⁷⁵456 N.E.2d 720 (Ind. 1983).

⁷⁶This is the same standard that is applied to the admission of photographs as demonstrative evidence. *E.g.*, *Hope v. State*, 438 N.E.2d 273 (Ind. 1982).

⁷⁷456 N.E.2d at 721 (emphasis deleted) (quoting *Bergner v. State*, 397 N.E.2d 1012, 1017 (Ind. Ct. App. 1979)).

⁷⁸456 N.E.2d at 723.

⁷⁹449 N.E.2d 1085 (Ind. 1983).

⁸⁰458 N.E.2d 1167 (Ind. Ct. App. 1984).

⁸¹Hospital or medical records are admissible in Indiana under the business records exception although a separate foundation for the admission of an expert opinion within the record may be required. *See supra* text accompanying note 58.

In *Fendley*, the insufficient chain of custody foreclosed the need for the court to resolve whether the report could have been admitted. 458 N.E.2d at 1170. In *Baker*, the report was admitted at the trial court despite the flawed chain of custody. The Indiana Supreme Court ruled the admission was error, but harmless. 449 N.E.2d at 1088.

The purpose of requiring an adequate chain of custody is to render improbable the chance the original item has either been exchanged with another, tampered with, or contaminated.⁸² Thus, the chain of custody necessary for any item of evidence depends upon the item. If the item is one which is unique or readily identifiable, clearly the chain of custody need not be elaborately established.⁸³ However, if the item is susceptible to alteration, tampering, or substitution, then the chain of custody foundation is more stringent.⁸⁴ Because body specimens are fungible and highly susceptible to contamination, a stringent chain of custody is necessary, though every remote possibility of tampering need not be ruled out.⁸⁵

*Arnold v. State*⁸⁶ offers what the Indiana Supreme Court recognizes as the minimal chain of custody evidence necessary to conclude the specimen taken from the person was the specimen subsequently analyzed. In *Arnold*, the State offered a "rape kit" assembled by a physician in the emergency room of the hospital. The physician testified that the kit offered by the State was the same kit assembled as a result of his examination of the victim. A serologist testified that she subjected the contents of the kit offered in evidence to testing. This "identicalness" of the specimen from the time of its taking to its delivery to a laboratory was held sufficient for a chain of custody foundation.⁸⁷

Unfortunately, in neither *Fendley* nor *Baker* was this evidence ever elicited. In *Fendley*, the physician testified that she ordered a blood test and was present when the sample was drawn. Additionally, an administrative technologist testified that the laboratory performed blood alcohol tests and recorded the results in the patient's hospital records, but did not testify as to the arrival of this particular blood sample in the laboratory and its testing. The court held that the failure to offer any evidence as to the means by which the blood was sent to and received

⁸²See *Arnold v. State*, 436 N.E.2d 288 (Ind. 1982). *Arnold* also addressed when the chain of custody rule begins to run: "The rule operates, however, only for the period after the evidence comes into the possession of law enforcement personnel." *Id.* at 291 (citations omitted). See also *Thorton v. State*, 268 Ind. 456, 376 N.E.2d 492 (1978). To correct any misunderstanding, the court in *Baker* noted that the statement was not intended to apply to chain of custody cases involving medical exhibits. 449 N.E.2d at 1088. Thus, the chain of custody must be established for body specimens tested and reported in an exhibit, whether or not the specimens are in police custody.

⁸³*Pollard v. State*, 270 Ind. 599, 388 N.E.2d 496 (1979) (State did not need to establish a complete chain of custody where officer scratched his initials on butt of gun and was later able to raise its partially obliterated serial number by use of an acid solution); *Jones v. State*, 457 N.E.2d 231 (Ind. Ct. App. 1983) (chain of custody sufficient where two ends of copper tubing taken from the same pipe were placed in evidence bag although the bag lacked being sealed by an inch).

⁸⁴*Jones v. State*, 260 Ind. 463, 296 N.E.2d 407 (1973).

⁸⁵*Bivins v. State*, 433 N.E.2d 387 (Ind. 1982).

⁸⁶436 N.E.2d 288 (Ind. 1982).

⁸⁷*Id.* at 291.

by the laboratory⁸⁸ prevented the trial court from reasonably concluding the sample was the same sample as the one taken by the physician.⁸⁹

The foundation offered for the hospital record and examination results of a rape victim was even more deficient in *Baker*. The hospital records were offered and admitted for the purpose of establishing sperm was found in the body specimen taken from the victim. Apparently no evidence was ever presented by the doctor or someone of authority present at the taking of the specimens, and no attempt was made to establish a chain of custody of the specimen.⁹⁰ The Indiana Court of Appeals found the admission of the records to be clear error in view of the total absence of proof of the specimen's chain of custody.⁹¹

Baker and *Fendley* merely reaffirm and stress the need for evidence of chain of custody before a sufficient foundation can be laid for the admission of a record containing test results on a body specimen. At a minimum, that evidence must establish that a physician or person of authority was present when the specimen was taken,⁹² that the specimen was then delivered to the laboratory, and that the laboratory performed tests on the same specimen.

C. Refreshing Recollection of Witness

In *Gaunt v. State*,⁹³ the Indiana Supreme Court granted a more liberal license to counsel who wish to refresh a witness' memory with a memorandum made while the facts were fresh in the recollection of the witness. Contrary to the rule previously observed in Indiana, the court adopted the view that if a memorandum is used merely to revive a memory, and the witness testifies from independent recollection, it is not essential that the memorandum be made at or near the time of the events recorded if the trial court is satisfied that the memorandum is not unreliable by reason of remoteness.⁹⁴ Under the prior rule, a witness could refer to a memorandum if it was either made at the time of the event or while the event was fresh in the witness' memory.⁹⁵ The rule remains unchanged to the extent that if a witness consults the memo-

⁸⁸For an example of a proper foundation which ensures identicalness of the specimens, see *Orr v. Econo-Car of Indianapolis*, 150 Ind. App. 411, 276 N.E.2d 524 (1971).

⁸⁹458 N.E.2d at 1170.

⁹⁰449 N.E.2d at 1087.

⁹¹*Id.* at 1088.

⁹²The identity of the person who actually takes the sample appears to be of little consequence. In *Fendley*, the doctor could not recall whether she or one of the nurses drew the sample. The court did not find this fatal to the chain of custody issue because the doctor was nonetheless able to ensure the blood specimen was Ford's. 458 N.E.2d at 1170 n.2.

⁹³457 N.E.2d 211 (Ind. 1983).

⁹⁴*Id.* at 216.

⁹⁵*Sage v. State*, 127 Ind. 15, 26 N.E. 667 (1891); *Prather v. Pritchard*, 26 Ind. 65 (1866); *Wabash & Erie Canal v. Bledsoe*, 5 Ind. 133 (1854); *Cleveland, C., C., & St. L.*

randum and he or she has an independent recollection of the facts contained therein, the witness may testify to those facts as being within his or her personal knowledge.⁹⁶

In *Gaunt*, the written memorandum offered to refresh the witness' memory was a deposition of the witness taken more than one year after the date of the crime, and almost a year before the testimony presented at trial.⁹⁷ At trial the witness stated that he remembered giving the deposition and that his memory of the events was better on the day of the deposition than on the day of trial. The witness further identified the deposition as a true copy of the testimony he had given. The Indiana Supreme Court held that the trial court had discretion to determine whether the remoteness in time between the events and the taking of the deposition rendered the deposition unreliable as an accurate record of the events.⁹⁸ The trial court did not abuse its discretion in permitting the witness to refresh his memory with the deposition.⁹⁹

Gaunt signals Indiana's complete adoption of the "classical" view of refreshing recollection which imposes no restriction upon the use of memoranda to refresh.¹⁰⁰ Thus, counsel may use any memorandum as

Ry. v. Woodburry Glass Co., 80 Ind. App. 298, 120 N.E. 426 (1918); Ellis v. Baird, 31 Ind. App. 295, 67 N.E. 960 (1903).

⁹⁶Clark v. State, 4 Ind. 156 (1853). The witness' ability to recall those facts which the witness had previously known, but which had at the moment escaped recollection, significantly determines whether the document is admissible for refreshing recollection or for substantive evidence under the past recollection recorded exception to the hearsay rule. Because the doctrines are easily confused, a brief review of their differences may be helpful.

In United States v. Riccardi, 174 F.2d 883 (3d Cir.), cert. denied, 337 U.S. 941 (1949), the doctrines were distinguished:

The primary difference between the two classifications [present recollection revived and past recollection recorded] is the ability of the witness to testify from present knowledge: where the witness' memory is revived, and he presently recollects the facts and swears to them, he is obviously in a different position from the witness who cannot directly state the facts from present memory and who must ask the court to accept a writing for the truth of its contents because he is willing to swear, for one reason or another, that its contents are true.

. . . .

The difference between present recollection revived and past recollection recorded has a demonstrable effect upon the method of proof. In the instance of past recollection recorded, the witness, by hypothesis, has no present recollection of the matter contained in the writing. Whether the record is directly admitted into evidence, or indirectly by the permissive parroting of the witness, it is nevertheless a substitute for his memory and is offered for the truth of its contents.

Id. at 886, 887 (footnote omitted).

⁹⁷457 N.E.2d at 216.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰See 3 J. WIGMORE, *supra* note 35, at § 7581 (McNaughton rev. 1961); see also C. MCCORMICK, *supra* note 16, at § 9.

a stimulus to present memory, without restriction as to authorship,¹⁰¹ guarantee of correctness,¹⁰² or time of making.¹⁰³ Although *Gaunt* grants counsel greater freedom in the use of memoranda to refresh a witness' memory, opposing counsel's opportunity to challenge the evidence admitted as a result of the refreshing has not been sacrificed or diluted. Even in the circumstance where the memorandum is made at a time remote from the incident, such as the night before the witness testifies,¹⁰⁴ the opposing counsel has the opportunity to subject the witness, while under oath, to cross-examination, and the witness' capacities for memory and perception may be attacked and tested. The witness' determination to tell the truth may be investigated and revealed, and any protestations of lack of memory will merely undermine the probative worth of the witness' testimony.

D. Opinion and Expert Testimony

A series of decisions from the Indiana courts treated the admission of opinion evidence or expert testimony regarding the speed of a motor vehicle. Although the decisions are consistent with the previous rules controlling the admission of such evidence, the decisions are instructive in the application of those rules to a variety of situations in which the issue arose. When read together, and the courts' statements distilled, it is clear the trial court has considerable latitude in the admission or rejection of marginally relevant opinion evidence. Further, a witness who qualifies as an expert may give an opinion of speed to aid the trier of fact, and the witness' knowledge of special factors, formulas, or calculations in forming the opinion will go to the weight of the testimony rather than its admissibility.

A divided Indiana Supreme Court ruled in *Martin v. Roberts*¹⁰⁵ that the rules of evidence do not require a witness to demonstrate a knowledge or use of specific scientific principles, formulas, or calculations in order to be qualified to state an opinion.¹⁰⁶ *Martin* involved a passenger's (Roberts') claim against the driver of a dune buggy for injuries sustained

¹⁰¹*Ellis v. Baird*, 31 Ind. App. 295, 67 N.E. 960 (1903) (a witness could refer to a bill for provisions furnished to decedent's estate in order to refresh his memory, although the bill was not made by the witness or at his direction).

¹⁰²Clearly, if the memorandum relied upon at trial was written by one other than the witness, *see id.*, the witness can make no legitimate guarantee of correctness.

¹⁰³*Gaunt* vests the only restriction as to the time of making the memorandum in the discretion of the trial judge. The memorandum need not be made while the facts are fresh in the recollection of the witness, or contemporaneous, or reasonably so, with the event.

¹⁰⁴*E.g.*, *Smith v. Bergmann*, 377 S.W.2d 519 (Mo. Ct. App. 1964).

¹⁰⁵464 N.E.2d 896 (Ind. 1984). The court's opinion was written by Justice Pivarnik, with whom Chief Justice Givan and Justice Hunter concurred. Justice DeBruler dissented with an opinion in which Justice Prentice concurred.

¹⁰⁶*Id.* at 899.

as a result of the driver's wanton and willful conduct.¹⁰⁷ The accident occurred while driving down a country road. The driver lost control of the dune buggy which crossed the road diagonally and the rear wheel of the dune buggy snagged on a telephone guy wire. The dune buggy stopped suddenly, catapulting the passengers from the vehicle.

In attempting to establish the driver's misconduct, Roberts called a state trooper who investigated the accident. The officer testified, over objection, that in his opinion the speed of the dune buggy was sixty-five miles per hour at the time of the accident.¹⁰⁸ In Indiana, it is proper for an expert witness to give an opinion in order to aid the trier of fact.¹⁰⁹ However, the fact that a witness is a police officer does not automatically qualify the officer to testify as an expert on the speed of motor vehicles.¹¹⁰ The party offering the officer as an expert witness has the burden of qualifying the officer as an expert.¹¹¹ The officer in *Martin* testified he was trained in accident investigation, and he had investigated from 200 to 300 accidents at the time of the investigation of the instant accident.¹¹² As part of his training, the officer was instructed how to determine the cause of an accident and how to estimate speed at the time of the accident from such data as skid marks and damage to the vehicle.¹¹³

The Indiana Court of Appeals and the parties agreed the officer qualified as an expert witness in the subject of estimating speeds.¹¹⁴ However, the court found this expertise and skill to be peculiarly inappropriate to this accident which did not involve a collision impact; rather, the damage to the vehicle apparently resulted from the exertion of tensile forces as opposed to compressive forces.¹¹⁵ More troubling to

¹⁰⁷At the time, the Indiana Automobile Guest Statute precluded recovery against the owner or operator of a motor vehicle unless the injuries were caused by the wanton or willful misconduct of the owner or operator. IND. CODE § 9-3-3-1 (1982) (*amended by* Act of Mar. 1, 1984, Pub. L. No. 68-1984, § 2, 1984 Ind. Acts 925, 925-26 (codified at IND. CODE § 9-3-3-1 (Supp. 1984))).

¹⁰⁸464 N.E.2d at 900.

¹⁰⁹*Blackmon v. State*, 455 N.E.2d 586 (Ind. 1983); *Washington v. State*, 271 Ind. 97, 390 N.E.2d 983 (1979); *Williams v. State*, 265 Ind. 190, 352 N.E.2d 733 (1976); *Terre Haute First Nat'l Bank v. Stewart*, 455 N.E.2d 362 (Ind. Ct. App. 1983).

¹¹⁰*McCraney v. Kuechenberg*, 144 Ind. App. 629, 634, 248 N.E.2d 171, 173 (1969).

¹¹¹"To qualify a witness as an expert, two requirements must be met:

'(1) the subject of the inference . . . [is] so distinctly related to some science, profession, business or occupation as to be beyond the ken of laymen. . . . [Second, there must be a showing] the witness . . . [has] sufficient skill, knowledge or experience in that field as to make it appear that his opinion or inference will probably aid the trier in his search for the truth.' "

Martin v. Roberts, 452 N.E.2d 182, 184 (Ind. Ct. App. 1983) (quoting *Davis v. Schneider*, 182 Ind. App. 275, 283, 395 N.E.2d 283, 290 (1979)).

¹¹²464 N.E.2d at 899.

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵452 N.E.2d at 186.

the court was the absence of any testimony by the officer concerning the facts, formulas, or factors the officer used in forming his opinion.

The data upon which the officer relied in forming his opinion consisted of his estimated distance of the debris and passengers from the chassis and the amount and nature of damage to the fiberglass body and chassis, including the forward displacement of the rear seat and the steering wheel.¹¹⁶ In addition, the officer offered photographs taken by him and his associates of the vehicle at the scene.¹¹⁷ The officer failed, however, to testify which, if any, of these factors were integral in a formula or principle for estimating speed, and further failed to disclose the formula or principle used in arriving at his opinion.¹¹⁸ In the absence of this evidence, the court concluded it was error to admit the officer's opinion.

The Indiana Supreme Court reversed and vacated the opinion of the court of appeals, specifically ruling that whether or not an expert has knowledge of, or actually uses, a formula which may aid in forming an opinion constitute factors which go to the weight of the opinion, not its admissibility.¹¹⁹ The majority reasoned that opposing counsel has the opportunity on cross-examination to question the expert on the specific knowledge or use of formulas and principles. Additionally, the counsel may bring forward other expert witnesses on the subject. Therefore, it is not required as part of the foundation for offering an expert's opinion to specify the formula, facts, or factors used to arrive at an opinion.¹²⁰

The justices dissenting in *Martin* echoed the cry sounded by the court of appeals: under the facts of this accident, the witness was not truly qualified to offer an opinion unless he also offered evidence of heightened training, skill, or experience with these unusual circumstances.¹²¹ The dissenting justices recognized, as did the court of appeals, that the officer's special expertise and knowledge is a threshold issue. Under the dissent's analysis, the trial court should have exercised greater care in ascertaining whether the offered witness was in a position to throw light on the question of speed of the vehicle.¹²²

¹¹⁶*Id.* at 185.

¹¹⁷464 N.E.2d at 900.

¹¹⁸452 N.E.2d at 186. The court of appeals hypothesized the formula might consider such factors as the weight and load of the vehicle, the weight of the occupants' bodies, and the manner and means by which the steering wheel and rear seats were attached. *Id.* at 187.

¹¹⁹464 N.E.2d at 899.

¹²⁰*Id.* at 901.

¹²¹*Id.* at 906. The dissent observed that the taut guy wire, the dissimilar front and rear tires, and the manner in which the fiberglass body had detached were special factors requiring special expertise. *Id.*

¹²²*Id.* (citing *New York Life Ins. Co. v. Kuhlenschmidt*, 218 Ind. 404, 33 N.E.2d 340 (1941)).

Estimates of the speed of a motor vehicle are not matters which are the exclusive province of experts.¹²³ Indiana has long recognized that lay opinions of speed are generally admissible in evidence.¹²⁴ Contrasted to the stringent requirements for admitting an expert opinion as to speed of a vehicle, a lay opinion by one who actually observes the vehicle in motion may be admitted with distinct ease.¹²⁵ Two lay opinions as to speed of a vehicle were admitted in *Carson v. State*¹²⁶ and, curiously, were held sufficient to sustain a conviction for a speeding charge. The facts of this curiosity piece are certain to enshrine LeRoy Carson as one of the true desperadoes in history and deserve full mention.

On October 30, 1982, LeRoy Carson and his wife drove through the town of Fowler. Fowler Police Chief James Patton and Fowler Street Superintendent Tom Tinsman, sitting in Tinsman's street department pickup truck, observed the Carsons as they passed through the town. Chief Patton determined that Carson was exceeding the thirty-five miles per hour posted speed limit in Fowler,¹²⁷ so he and Tinsman gave chase. Although Patton turned on the truck's amber and red lights and flashed his headlights, Carson failed to see them or stop. Consequently, a police roadblock was set up, and the Carsons were stopped at gunpoint about ten miles from Fowler. Carson was cited for speeding. In a trial by court, he was convicted and fined three dollars and costs.

Carson appealed, contending that the lay opinions of Patton and Tinsman constituted the only evidence of his speed and were not sufficiently reliable to ground a judgment. Although the court acknowledged that lay opinions are always somewhat suspect,¹²⁸ the court declined to find the unassisted opinions untrustworthy or insufficient to sustain the conviction.

Obviously, as the layperson's opinion becomes more "technical" and more precise, it becomes increasingly suspect. A witness may testify a distance was "long" or "short"; however, if the witness attempts to testify that the distance was fifty meters and not fifty-five meters, the accuracy should be questioned and the basis for the witness' opinion investigated. The lay opinion in *Carson* established the vehicle's speed

¹²³See generally 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 1701 (1980).

¹²⁴See, e.g., *Perry v. State*, 255 Ind. 623, 266 N.E.2d 4 (1971); *American Motor Car Co. v. Robbins*, 181 Ind. 417, 103 N.E. 641 (1913); *Louisville, N.A. & C. Ry. v. Hendricks*, 128 Ind. 462, 28 N.E. 58 (1891); *Garr v. Blissmer*, 132 Ind. App. 635, 177 N.E.2d 913 (1961).

¹²⁵Opinions of lay witnesses are often admissible upon nontechnical subjects such as estimates of speed, distance, height, and size, for the reason that in such cases it is difficult or impossible for the witness to explain his or her mental processes to the jury. *Perry v. State*, 255 Ind. 623, 629, 266 N.E.2d 4, 8 (1971).

¹²⁶459 N.E.2d 734 (Ind. Ct. App. 1983).

¹²⁷Patton and Tinsman later testified it was their opinion Carson was traveling at 45 miles per hour.

¹²⁸*Id.* at 735.

at forty-five miles per hour in a thirty-five miles per hour zone. Allowing for a margin of error, Police Chief Patton and Tinsman necessarily had to be able to estimate with a fair degree of precision to place Carson above the thirty-five miles per hour limit. Whether such preciseness could be achieved without the assistance of radar or speedometer matching is questionable.¹²⁹

Carson is illustrative of the great deference appellate courts will grant to the trial court in the admission of marginally credible evidence. Further, much discretion is vested in the court or trier of fact who may consider such subjective elements as the sartorial appearance of the witness in considering the weight assigned to evidence once admitted.

Ostensibly, the court of appeals was reluctant to disturb the weight assigned to the witnesses' lay opinions when the burden of proof in speeding infraction cases is merely a preponderance of the evidence.¹³⁰ Under a standard of preponderance the trial court needed to give only slightly more credence to the lay opinions than to Carson's denial of guilt.

In *Gates v. Rosenogle*,¹³¹ the court of appeals again deferred to the discretion of the trial court in the admission of a lay opinion of speed. However, the opinion was based not upon visual observation of the vehicle, but upon the sound of the vehicle. *Gates* was a suit for personal injuries sustained in a collision between a motorcycle on which the plaintiff was a passenger and a van driven by the defendant. In defense, the defendant sought to give his opinion as to the speed of the motorcycle before impact. His opinion was based solely upon the sound of the motorcycle's engine as it approached the van.

Courts have generally disagreed whether an opinion of speed from a layperson who did not actually see the vehicle as it traveled, but only heard it, is admissible.¹³² Most courts recognize visual perception is not the exclusive sensory means of gaining personal knowledge. However, courts are reluctant to admit opinions based on knowledge attained solely by auditory perception, especially where the opinions purport to be precise.¹³³ *Kuhn v. Stephenson*,¹³⁴ an early Indiana case on which de-

¹²⁹Police Chief Patton and Tinsman attempted to check Carson's speed on the speedometer of the pickup truck, but by that time Carson had left the city limits and was traveling 55 miles per hour which was the posted speed. 435 N.E.2d at 735.

¹³⁰IND. CODE § 34-4-32-1(d) (1982).

¹³¹452 N.E.2d 467 (Ind. Ct. App. 1983).

¹³²See 8 AM. JUR. 2D, *supra* note 123, § 1073 (1980); see also Annot., 33 A.L.R.3D 1405 (1970).

¹³³See *Green v. Richardson*, 69 Mich. App. 133, 244 N.W.2d 385 (1976) (where witness had no special experience or qualification regarding estimating speed, the witness' opinion that the car was traveling 70 miles per hour based on the sound of engine and sound of tires on gravel was properly excluded). *But see Rone v. Miller*, 257 Ark. 791, 520 S.W.2d 268 (1975) (where court held admissible a nonexpert's opinion that from sound car was being "driven real fast" or was "overspeeding").

¹³⁴87 Ind. App. 157, 161 N.E. 384 (1928).

fendant relied, permitted an opinion of speed from a witness who had heard, but had not seen, the vehicle. The court noted, however, that the witness was uniquely qualified because he was a mechanic with twelve years experience and was familiar with the model of the vehicle involved.¹³⁵ Under those facts, the appellate court concluded it was not error to admit the opinion.¹³⁶ In *Gates*, the defendant argued he had owned and ridden motorcycles and previously observed motorcycles racing on the street where the accident occurred. He admitted, however, that he was not familiar with the model of motorcycle involved in the accident. In light of the witness' lack of special qualifications, the court of appeals held the trial court did not abuse its discretion in excluding the opinion.¹³⁷

When *Gates* and *Kuhn* are considered together it is clear that the touchstones for the opinion's admission are the credentials and special expertise of the layperson. A trial court may admit a layperson's opinion of speed based solely on auditory perception if the layperson holds unique experimental qualifications. Where the layperson possesses no special talents or familiarity with the vehicle, however, the trial court may properly exclude the opinion.

¹³⁵*Id.* at 160, 161 N.E. at 384.

¹³⁶*Id.* at 160, 161 N.E. at 385.

¹³⁷452 N.E.2d at 471.

VIII. Insurance

STEPHEN E. ARTHUR*

During the survey period, the Indiana courts and legislature addressed a number of insurance principles which govern the rights and responsibilities that exist between an insurance company and its insured. Significantly, the Indiana Supreme Court reversed a line of cases by the Indiana Court of Appeals dealing with an insured's duty to give proper notice of a claim and to cooperate with the insurance company in investigating and defending that claim.¹ Additionally, the General Assembly codified the clear and convincing evidence standard for awarding punitive damages,² and partially repealed the Guest Statute, limiting its application to the immediate family of the owner or operator and to hitchhikers.³

A. General Insurance Principles

1. Notice Requirement and the Duty to Cooperate.—In order to ensure that an insurance company can investigate and acquire full information concerning the circumstances of an insured's claim, insurance policies typically require that the insured give the company notice of any claims made against the insured as soon as reasonably practicable.⁴ Moreover, policies often require that the policyholder give the insurer notice of occurrences or losses which have not resulted in an action against the insured but which might invoke coverage under the insurance contract.⁵ Thereafter, an insured has a duty to cooperate with and assist the insurance company in its investigation, processing, and litigation of the insured's claim.⁶ Together, the notice requirement and the requirement for the insured to cooperate with the insurance company generally are conditions precedent to the insurer's duty to provide coverage under the

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¹Miller v. Dilts, 463 N.E.2d 257 (Ind. 1984).

²IND. CODE §§ 34-4-34-1,-2 (Supp. 1984).

³IND. CODE § 9-3-3-1 (Supp. 1984).

⁴Hartford Accident & Indem. Co. v. Armstrong, 125 Ind. App. 606, 127 N.E.2d 347 (1955); London Guarantee & Accident Co. v. Siwy, 35 Ind. App. 340, 66 N.E. 481 (1903); R. KEETON, INSURANCE LAW § 7.2(a), at 445-49 (1971).

⁵See Hartford Accident & Indem. Co. v. Lochmandy Buick Sales, Inc., 302 F.2d 565 (7th Cir. 1962).

⁶Motorists Mut. Ins. Co. v. Johnson, 139 Ind. App. 622, 631, 218 N.E.2d 712, 717 (1966); 14 COUCH, CYCLOPEDIA OF INSURANCE LAW § 51:106 (2d ed. 1982).

policy.⁷ Thus, when an insured fails to cooperate or to give reasonable notice under the terms and conditions of the policy, the insurance company will often refuse to defend or indemnify that insured in any lawsuit or settlement negotiations which flow from the insured.

In *Miller v. Dilts*,⁸ the Indiana Supreme Court considered whether or not an insurer must demonstrate actual prejudice from the insured's lack of notice or failure to cooperate before the insurer can refuse to defend or indemnify the policyholder. In resolving the "actual prejudice" dilemma, the supreme court granted transfer and vacated three Indiana Court of Appeals' decisions: *Indiana Insurance Co. v. Williams*,⁹ *Kosanovich v. Meade*,¹⁰ and *Miller v. Dilts*.¹¹

In *Indiana Insurance Co. v. Williams*,¹² the insurer issued an automobile liability policy to Williams. On April 20, 1980, Williams was involved in an automobile accident and was charged with driving under the influence of alcohol. Williams entered into a court-approved plea agreement in which he admitted guilt and agreed to assume the liability and indemnification for damages resulting from the automobile accident. Williams did not give notice of the accident to Indiana Insurance until October 9, 1980, approximately six months after the accident and more than one month after he had entered into the plea agreement.¹³

Indiana Insurance filed a declaratory judgment action to determine whether it owed Williams a duty to pay the damages which Williams had agreed to assume as part of his plea agreement. Indiana Insurance alleged that it owed no duty to Williams because Williams had failed to notify it of the accident or plea negotiations within a reasonable time following the accident and had failed to cooperate as required by the insurance policy.¹⁴ The trial court initially granted the insurer's motion for summary judgment, but following the submission of affidavits by

⁷*London Guarantee & Accident Co. v. Siwy*, 35 Ind. App. 340, 345, 66 N.E. 481, 482 (1903).

⁸463 N.E.2d 257 (Ind. 1984).

⁹448 N.E.2d 1233 (Ind. Ct. App. 1983), *vacated sub nom. Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984).

¹⁰449 N.E.2d 1178 (Ind. Ct. App. 1983), *vacated sub nom. Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984).

¹¹453 N.E.2d 299 (Ind. Ct. App. 1983), *vacated*, 463 N.E.2d 257 (Ind. 1984).

¹²448 N.E.2d 1233 (Ind. Ct. App. 1983), *vacated sub nom. Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984).

¹³463 N.E.2d at 259.

¹⁴The insured's duty to cooperate and to notify Indiana Insurance was set forth in the policy as follows:

"PART VII—CONDITIONS

The insurance provided by this policy is subject to the following conditions:

A. YOUR DUTIES AFTER ACCIDENT OR LOSS:

1. You must promptly notify us or our agent of any accident of loss.
You must tell us how, when and where the accident and loss happened.
You must assist in obtaining the names and addresses of any injured

the insured, it reversed judgment.¹⁵ Indiana Insurance appealed, and the Indiana Court of Appeals affirmed the trial court's decision.¹⁶

The court of appeals stated that an insured's duty to notify and cooperate are conditions precedent to the insurer's duty to extend coverage under the insurance contract.¹⁷ The court noted, however, a previous decision which held that the insurer must demonstrate actual prejudice from the insured's failure to assist or cooperate before avoiding liability under a policy of insurance.¹⁸ Applying this rationale to the duty to give notice of an occurrence or claim, the court of appeals determined that the insurer must prove actual prejudice from the insured's failure to give notice of a claim or occurrence before it can avoid coverage liability to its insured.¹⁹

Next, in *Kosanovich v. Meade*,²⁰ the insured, Meade, was driving when his automobile struck Kosanovich's. Settlement negotiations between Meade's carrier, National Insurance Association, and Kosanovich were unsuccessful. Subsequently, Kosanovich obtained a default judgment

persons and witnesses.

2. Additionally, you and other involved insured must:

a. Cooperate with us in the investigation, settlement or defense of any claim or suit. No insured shall, except at his or her own cost, voluntarily make any payment[,], assume any obligation or incur any expense."

448 N.E.2d at 1235-36 (quoting the insurance policy).

¹⁵*Id.*

¹⁶*Id.* at 1237.

¹⁷*Id.* at 1236.

¹⁸*Id.* (citing *Motorists Mut. Ins. Co. v. Johnson*, 139 Ind. App. 622, 628, 218 N.E.2d 712, 717 (1966)).

¹⁹448 N.E.2d at 1237. In his dissent, Judge Hoffman stated that the duties to cooperate and to provide a timely notice are separate and distinct contractual provisions. In his view, the majority incorrectly treated the notice provision as merely one factor to be considered under the cooperation clause and therefore rendered that notice clause meaningless. Judge Hoffman stated:

[N]otice is not equivalent to cooperation and does not serve the same objectives. Notice is a threshold requirement which must be met before an insurer is even aware that a controversy or matter exists which requires the cooperation of the insured. The notice requirement of an insurance policy "is material, and of the essence of the contract." *London, etc., Accident Co. v. Siwy* (1903), 35 Ind.App. 340, at 345, 66 N.E. 481, at 482. Once an insured fails to give the insurer timely notice of an accident or loss, the entire set of circumstances surrounding the matter change, placing the insurer in a disadvantageous position. The scene of the accident may change with the passage of time, witnesses may have died or moved away, or at best their memories may have been dimmed by the passage of time. All of these circumstances combine to place the insurer in a difficult position that could have been avoided by timely notice, and the most cooperative insured cannot erase this prejudice suffered by the insurer.

448 N.E.2d at 1238 (Hoffman, P.J., dissenting).

²⁰449 N.E.2d 1178 (Ind. Ct. App. 1983), *vacated sub nom.* *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984).

against Meade which Kosanovich attempted to enforce by garnishing the proceeds of the insurance policy issued by National. National was notified of Kosanovich's action only after the trial court had entered the default judgment. The insurance company, as garnishee defendant, filed a declaratory judgment action against Meade, alleging that it had not duty to defend or indemnify Meade because Meade had failed to give prompt notice of the accident and lawsuit. Kosanovich intervened and filed an answer which contradicted the insurance company's failure of notice claim. Entering summary judgment for National, the trial court determined that National had been prejudiced by not having been notified of Kosanovich's suit and that it was not liable to Meade.²¹

Reversing the trial court,²² the court of appeals stated that National could not avoid its policy as a matter of law simply by establishing that its insured failed to cooperate.²³ It affirmed the rule that an insurer must demonstrate actual prejudice before it can deny coverage following an insured's noncompliance with the policy's notice requirement.²⁴

Finally, in *Miller v. Dilts*,²⁵ the insured was involved in an automobile accident on February 2, 1979, but the insurance company, State Farm Mutual, was not notified until after a lawsuit was filed against the insured on September 5, 1979. An attorney retained by State Farm initially appeared for the insured but later withdrew when State Farm determined that the insured had not complied with the notice provisions under the policy. State Farm refused to defend the insured and a judgment resulted against the insured in the amount of \$27,500. The winning plaintiffs attempted to garnish the amount from State Farm's policy, but the trial court entered summary judgment in favor of State Farm, holding that the insured's failure to give notice until seven months after the accident unduly prejudiced State Farm.²⁶

The Indiana Court of Appeals, following the decisions of *Indiana Insurance* and *Kosanovich*, rejected the presumption of prejudice where an insured does not promptly notify the insurance company about an accident or lawsuit.²⁷ The court of appeals reversed the trial court's summary judgment, stating that prejudice is a matter "exclusively reserved for determination by the trier of fact."²⁸

²¹449 N.E.2d at 1178-79.

²²*Id.* at 1180.

²³*Id.*

²⁴*Id.* (citing *Indiana Ins. Co. v. Williams*, 448 N.E.2d 1233 (Ind. Ct. App. 1983)). Judge Hoffman again dissented, based on the same rationale in his dissenting opinion to the *Indiana Insurance Co. v. Williams*, 448 N.E.2d 1233, 1237-39 (Ind. Ct. App. 1983). See *supra* note 19.

²⁵453 N.E.2d 299 (Ind. Ct. App. 1983), *vacated*, 463 N.E.2d 257 (Ind. 1984).

²⁶453 N.E.2d at 300.

²⁷*Id.* at 301.

²⁸*Id.* (citing *McGinnis v. Public Serv. Co. of Ind., Inc.*, 161 Ind. App. 1, 5, 313

On transfer, the Indiana Supreme Court vacated these three decisions.²⁹ The supreme court stated that the duties to notify and to cooperate are conditions precedent to an insurance company's liability to defend and indemnify its insured.³⁰ Furthermore, where the insured's noncompliance with these policy conditions creates prejudice, the company is relieved of all liability under the policy.³¹ Distinguishing the duty to notify from the duty to cooperate, the supreme court stated that prejudice to the insurance company will be presumed by an unreasonable delay in notifying the company about an occurrence or lawsuit under the policy,³² whereas the insurer must affirmatively demonstrate prejudice from an insured's failure to cooperate or assist in a defense.³³

The Indiana Supreme Court adopted the rationale of two Seventh Circuit Court of Appeals opinions in support of its "presumption of prejudice" rule.³⁴ In *Hartford Accident & Indemnity Co. v. Lochmandy Buick Sales*,³⁵ the defendant waited twenty-two months before informing its insurance company of a compensable accident.³⁶ The Seventh Circuit determined that the insured had failed to act prudently and reasonably in notifying its insurer of an occurrence under the policy.³⁷ The court stated that once the trial court finds noncompliance under the policy, actual prejudice to the insurer will be presumed unless that presumption is rebutted by affirmative evidence from the insured.³⁸

N.E.2d 708, 710 (1974)).

²⁹463 N.E.2d 257, 266 (Ind. 1984).

³⁰*Id.* at 260-61.

³¹*Id.* at 261 (citing *Motorist Mut. Ins. Co. v. Johnson*, 139 Ind. App. 622, 218 N.E.2d 712 (1966)).

³²463 N.E.2d at 265.

³³*Id.* at 261 (citing *Motorist Mut. Ins. Co. v. Johnson*, 139 Ind. App. 622, 218 N.E.2d 712 (1966)). In another case decided during this survey period, *Newport v. MFA Ins. Co.*, 448 N.E.2d 1223 (Ind. Ct. App. 1983), the Indiana Court of Appeals examined an insured's duty to cooperate with his insurer. The court of appeals stated that "[t]he problem of non-cooperation has a dual aspect: not only what the assured failed to do, but what the insurer on its part did to secure co-operation from an apathetic, inattentive, or vanished policy holder, must be considered," *Id.* at 1229 (quoting *Pennsylvania Threshermen & Farmer's Mut. Cas. Ins. Co. v. Owens*, 238 F.2d 549, 550-51 (4th Cir. 1956)). The Indiana Court of Appeals stated that the insurer has the burden of demonstrating good faith and diligence in securing the cooperation of its insured, and this requirement is designed to prevent an insurance company's collusion with its insured to defeat the carrier's liability under the policy to an injured claimant by securing the insured's absence from trial. 448 N.E.2d at 1229.

³⁴463 N.E.2d at 262-63 (citing *Ohio Casualty Ins. Co. v. Ryneearson*, 507 F.2d 573 (7th Cir. 1974); *Hartford Accident & Indem. Co. v. Lochmandy Buick Sales, Inc.*, 302 F.2d 565 (7th Cir. 1962)).

³⁵302 F.2d 565 (7th Cir. 1962).

³⁶*Id.* at 565-66.

³⁷*Id.* at 567.

³⁸*Id.* at 567-68.

The state supreme court also relied upon *Ohio Casualty Insurance Co. v. Ryneearson*,³⁹ in which the judgment defendant failed to notify his insurance company until approximately two years after the occurrence. The insurance carrier brought a declaratory judgment action against the insured, and the district court granted summary judgment in favor of Ohio Casualty for late notice. The Seventh Circuit rejected the insured's argument that he should be excused from providing notice because he did not believe he was liable for the accident. The court concluded that Ohio Casualty was entitled to prompt notice, regardless of whether or not the insured believed that a claim of damages would not arise.⁴⁰ The Seventh Circuit stated that when notice is unreasonably late, a presumption of prejudice arises as a matter of law.⁴¹

Relying in part on these federal opinions, the Indiana Supreme Court held that an insured's failure to give notice of an occurrence under the policy results in an absolute forfeiture of the insured's right to claim a defense or indemnification under the policy.⁴² It determined, however, that the insured can rebut the presumption of prejudice by presenting evidence that prejudice did not occur, and once such evidence is introduced, the question becomes one for the trier of fact and not the court as a matter of law.⁴³

The supreme court, therefore, has established a two-pronged analysis for determining when an insurance company may deny coverage to an insured who fails to notify the carrier of an occurrence or loss. First, the court must determine whether the insured failed to provide reasonable notice to the insurance company. In resolving this question, the court must focus not only on the length of time which has expired between the occurrence and the notice, but on circumstances of excuse or waiver which affect the reasonableness of the insured's actions. When the court determines that the insured acted unreasonably, a presumption will arise that the insurance company actually was prejudiced by the insured's noncompliance. Second, if the insured can establish some evidence that prejudice did not occur, the matter must be resolved by the trier of fact, not by the court as a matter of law.

2. *Punitive Damages Following Travelers Indemnity*.—As noted, in *Travelers Indemnity Co. v. Armstrong*,⁴⁴ the Indiana Supreme Court adopted the clear and convincing evidence standard as the basis for

³⁹507 F.2d 573 (7th Cir. 1974).

⁴⁰*Id.* at 578.

⁴¹*Id.* at 579.

⁴²463 N.E.2d at 263.

⁴³*Id.* at 265-66.

⁴⁴442 N.E.2d 349 (Ind. 1982). See Arthur, *Insurance, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 223 (1984).

proving punitive damages.⁴⁵ In that decision, the supreme court determined that the insured has no inherent right to punitive damages:

[P]unitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing.⁴⁶

During this survey period, the Indiana General Assembly codified the *Travelers* rule and provided that a claimant must support a recovery of punitive damages by clear and convincing evidence in *all* civil actions where punitive damages are requested.⁴⁷ In addition, the appellate courts applied the *Travelers* decision retroactively and rejected a series of punitive damage awards under the preponderance of the evidence standard.

In *Farm Bureau Mutual Insurance Co. v. Dercach*,⁴⁸ an insured brought an action on an automobile policy for loss of use, additional repairs, mental anguish, and punitive damages. Following a judgment for the insured and an award of punitive damages in the amount of \$25,000,⁴⁹ the insurance company appealed and the Indiana Court of Appeals reversed the judgment for punitive damages.⁵⁰

The court of appeals based its decision on two grounds. First, the court recognized that the purposes served by imposing punitive damages, to punish the wrongdoer and to deter future misconduct,⁵¹ were similar to those served by operation of criminal law. Consequently, the court indicated, it would be appropriate to apply a longstanding criminal law rule that it is within the province of the court to apply a new rule of law retrospectively and to give that law effect as to all cases on direct review.⁵² Second, the court of appeals noted that *Travelers* had applied the clear and convincing evidence rule retrospectively to the facts of that case. Therefore, the appeals court concluded, it was appropriate to apply the *Travelers* standard to all cases on direct appeal at the time

⁴⁵442 N.E.2d at 358-63.

⁴⁶*Id.* at 362.

⁴⁷IND. CODE §§ 34-4-34-1,-2 (Supp. 1984).

⁴⁸450 N.E.2d 537 (Ind. Ct. App. 1983).

⁴⁹*Id.* at 538-39.

⁵⁰*Id.* at 542.

⁵¹*Id.* at 541 (citing *School City of East Chicago v. East Chicago Fed'n of Teachers*, 422 N.E.2d 656 (Ind. Ct. App. 1981); *Nate v. Galloway*, 408 N.E.2d 1317 (Ind. Ct. App. 1980)). The court noted that since compensation for the injured party is not the objective of punitive damages, the injured party does not have an entitlement in the nature of a property right to such damages. 450 N.E.2d at 541.

⁵²450 N.E.2d at 541 (citing *Linkletter v. Walker*, 381 U.S. 618 (1965)).

the *Travelers* decision was issued.⁵³ The court of appeals reversed the punitive damages award even though the record showed that no objection had been made to the trial court's instruction that punitive damages could be awarded upon a simple preponderance of the evidence and even though the jury verdict was returned more than a year before the *Travelers* decision.⁵⁴

Similarly, in *Lloyds of London v. Locke*,⁵⁵ the insurer appealed from a jury verdict which awarded the insured punitive damages for the wrongful denial of liability under an insurance policy. The court of appeals reversed the award of punitive damages⁵⁶ and cited *Don Medow Motors, Inc. v. Grauman*,⁵⁷ an opinion which held that "enunciations of the common law through judicial opinions rendered in civil cases have retrospective as well as prospective effect, except where the enunciation would impair contracts made, or vested rights acquired, in reliance on an earlier decision."⁵⁸ In the *Don Medow* case, the court reversed and remanded on the issue of punitive damages in order to apply the clear and convincing evidence standard.⁵⁹ Likewise, the court of appeals in *Lloyds of London* stated that the clear and convincing evidence standard should be applied retroactively and remanded the punitive damages issue for a new trial under the evidentiary standard established in *Travelers*.⁶⁰

Finally, an action for punitive damages that was filed after the completion of an arbitration proceeding was held barred by the doctrines of res judicata and collateral estoppel in *United States Fidelity & Guaranty Co. v. DeFluiter*.⁶¹ The insured, DeFluiter, was injured in a motorcycle accident with an uninsured motorist and submitted a claim for personal injury based upon the uninsured motorist provision of his insurance policy. United States Fidelity initially denied DeFluiter's claim, but later admitted coverage and entered into arbitration proceedings to determine the amount of his damages. After DeFluiter was awarded compensatory damages, he filed an action against United States Fidelity seeking punitive damages for the carrier's initial wrongful refusal to provide coverage. The trial court awarded DeFluiter \$1.6 million in punitive damages, and

⁵³450 N.E.2d at 541.

⁵⁴*Id.*

⁵⁵454 N.E.2d 81 (Ind. Ct. App. 1983).

⁵⁶*Id.* at 84.

⁵⁷446 N.E.2d 651 (Ind. Ct. App. 1983).

⁵⁸*Id.* at 654 (citations omitted).

⁵⁹*Id.* at 655. *See also* Tuthill Corp. Fill-Rite Div. v. Wolfe, 451 N.E.2d 72 (Ind. Ct. App. 1983) (punitive damages award reversed in a contract case and remanded so that the clear and convincing evidence standard could be applied).

⁶⁰454 N.E.2d at 83.

⁶¹456 N.E.2d 429 (Ind. Ct. App. 1983).

United States Fidelity appealed the award.⁶²

The court of appeals reversed the trial court's award of punitive damages,⁶³ stating that the insured was barred from bringing an action for punitive damages because the same parties and the same nexus of facts submitted during the arbitration proceeding were at issue in the civil action for punitive damages.⁶⁴ The court reached this conclusion even though punitive damages could not have been awarded through arbitration proceedings, as such an award would have been outside the jurisdiction of the arbitrator.⁶⁵ The court of appeals stated that the prior arbitration proceeding resulted in a final and binding judgment which was *res judicata* to a subsequent litigation of the matter.⁶⁶ It concluded that the insured's election to choose a forum in which punitive damages were not available barred a later action involving the same matter when those issues could have been raised, litigated, and decided in one civil action.⁶⁷

B. Property Insurance

1. *Option to Purchase and the Right to Share in Insurance Proceeds.*—In *Tippmann Refrigeration Construction v. Erie Haven, Inc.*,⁶⁸ the parties entered into a lease which provided the lessee an option to purchase if the option were exercised within twelve months from the commencement of the lease. The property was destroyed by fire, however, and the lessor terminated the lease. Following that termination, the lessee tried to exercise its option to purchase but the lessor refused to sell the property or share the fire insurance proceeds with the lessee. The lessee brought an action for those proceeds but the trial court granted summary judgment in favor of the lessor.⁶⁹

Reversing the trial court,⁷⁰ the Indiana Court of Appeals applied the general rule of contract construction that language in a lease should be interpreted so that no term or condition is treated as surplusage if it can be given a meaning reasonably consistent with the other parts of the lease.⁷¹ Since the lease-option agreement provided that the “[l]essor agrees, at its expense, to maintain fire and extended coverage insurance

⁶²*Id.* at 430.

⁶³*Id.* at 433.

⁶⁴*Id.* at 432.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.* at 432-33.

⁶⁸459 N.E.2d 407 (Ind. Ct. App. 1984). For a further discussion of this case, see Krieger, *Property, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 347, 372-73 (1985).

⁶⁹*Id.* at 408.

⁷⁰*Id.* at 411.

⁷¹*Id.* at 409 (citing *Woodruff v. Wilson Oil Co.*, 178 Ind. App. 428, 431, 382 N.E.2d 1009, 1011 (1978)).

on the building being leased herein;”⁷² the court of appeals concluded that this term must be construed to benefit both parties since the lessor always had the right to maintain insurance on his leased property for his own benefit and protection.⁷³ The court of appeals remanded the case for a determination of the appropriate division of insurance proceeds between the lessor and lessee.⁷⁴

In *United Farm Bureau Mutual Insurance Co. v. Blanton*,⁷⁵ the Indiana Court of Appeals determined the extent to which an insurable interest will survive the insured's sale of property to a third party. The insured vendors sold their residential property to a purchaser with the understanding that the purchaser would assume the vendors' mortgage on the property. The vendors gave the purchaser a blank warranty deed, and the purchaser represented that he would execute and record the deed, assume liability on the vendors' mortgage, and seek an assignment of the vendors' homeowners insurance policy. The purchaser failed, however, to take these actions and, instead, sold the property on contract to a third party. The third party also agreed to insure the property but failed to do so prior to the date on which a fire occurred and damaged the property. Following the fire, the third party abandoned possession of the property. Both the purchaser and vendors filed a claim with Farm Bureau, the insurer of the vendors, for property damage caused by the fire. Farm Bureau refused to pay the claim and the vendors and purchaser filed suit. Farm Bureau filed a counterclaim which alleged that the purchaser's failure to obtain an assignment of the insurance policy was negligence and thus barred any claim under the policy issued to the vendors. The trial court entered a judgment on behalf of the vendors but against the purchaser and Farm Bureau.⁷⁶

The Indiana Court of Appeals affirmed the trial court and determined that the vendors had retained an insurable interest in the fire-damaged premises to the extent of their liability on the mortgage:⁷⁷ “A person has an insurable interest in property if he obtains a benefit from the property's existence or would suffer a loss from its destruction. It is not essential that he hold a security interest in or title to the property.”⁷⁸ The court noted that the vendors remained liable on the mortgage even after transferring possession of the property to the purchaser.⁷⁹ It rejected

⁷²459 N.E.2d at 409 (quoting the lease-option agreement).

⁷³*Id.*

⁷⁴*Id.* at 410.

⁷⁵457 N.E.2d 609 (Ind. Ct. App. 1983).

⁷⁶*Id.* at 610.

⁷⁷*Id.* at 611-12.

⁷⁸*Id.* at 611 (citing *All Phase Constr. Corp. v. Federated Mut. Ins. Co.*, 168 Ind. App. 19, 340 N.E.2d 835 (1976); *Ebert v. Grain Dealers Mut. Ins. Co.*, 158 Ind. App. 379, 303 N.E. 2d 693 (1973)).

⁷⁹457 N.E.2d at 611.

Farm Bureau's argument that the insurance policy related to the insured rather than to the property protected by the policy or that the policy became void after the vendors sold the property.⁸⁰ Since the damage caused by the fire impaired the vendors' security for their mortgage, the court held that the vendors had an insurable interest to the extent of the vendors' mortgage obligation.⁸¹

Finally, the court noted that many insurance policies contain an exclusion which provides that the policy will be void if the insured's interest in the property changes or if title to the property changes without prior approval of the insurance company.⁸² Because no similar exclusion was at issue or proven to be part of the policy issued by Farm Bureau, the court of appeals refused to impose such an exclusion as a matter of law.⁸³

2. *Contract Limitations in Property Loss Cases.*—Property insurance policies often contain limitations clauses which provide that no action on the policy may be maintained unless commenced within a specified period following a compensable loss.⁸⁴ Moreover, an insured must commence a first-party action against his insurer within the limitations period or lose his right to enforce coverage, unless the insured can demonstrate a waiver or estoppel which would bar the insurance company's reliance on the limitation defense.⁸⁵

⁸⁰*Id.* at 611-12.

⁸¹*Id.* at 611.

⁸²*Id.* at 611-12. See *Farmers Mut. Fire Ins. Co. of LaPorte County v. Olson*, 74 Ind. App. 449, 129 N.E. 234 (1920); *New v. German Ins. Co. of Freeport*, 5 Ind. App. 82, 31 N.E. 475 (1892).

⁸³457 N.E.2d at 612.

⁸⁴A. WINDT, *INSURANCE CLAIMS AND DISPUTES* § 9.03, at 345-46 (1982). These limitation clauses have been recognized as a method by which an insurer can limit his exposure to disputed and stale claims. Such clauses generally have been upheld so long as the contract limitation does not diminish the rights afforded an insured under the controlling statute of limitations. *Id.* at 346-47. See generally *Scalf v. Globe American Casualty Co.*, 442 N.E.2d 8 (Ind. Ct. App. 1982).

⁸⁵A. WINDT, *INSURANCE CLAIMS AND DISPUTES* § 9.05, at 348-49. The author identifies several actions by the insurer which might invoke the waiver or estoppel bars:

As a practical matter, therefore, an insurance company will be precluded from denying coverage based on a failure to file suit within the contractual limitations period if the institution of the suit was delayed beyond the prescribed period:

1. Because of a promise by the company to pay the claim
2. Because of a promise to pay a portion of the claim, in which event the insurer will be precluded from relying on the limitations clause, but only as to that portion of the claim that it promised to pay
3. Because the company made representations to the insured that reasonably led the insured to believe that the company intended to lengthen the limitations period
4. Because the company affirmatively misled the insured about the possibility of settlement

With regard to the last reason, it is not necessary that the carrier have intended

In *Wingenroth v. American States Insurance Co.*,⁸⁶ the Wingenroth's residence sustained roof damage during a storm on June 29, 1976. Their insurer, American States, issued a check to the Wingenroth's more than one year after the date of the storm. The check was issued in payment for repairs made to the roof. The insureds, however, hesitated to endorse the check; fearing that if they did, American States might refuse to pay for additional damages subsequently discovered. As a result, American States informed the insureds by letter that, in the event additional damages were discovered at a later date, American States would honor the additional claim. The Wingenroths endorsed the check and subsequently experienced additional problems with their roof. The Wingenroth's attributed the repairs to the original storm damage, but American States contended that the damages were the result of the roof's natural deterioration. Yet, on November 4, 1979, American States issued a second check to pay for the repairs made to the roof. Subsequent repairs were again required, and American States and the Wingenroths were unable to resolve their disagreement as to the cause of the roof problems. On April 29, 1982, the Wingenroths initiated an action against American States to recover the additional costs incurred in repairing the roof. American States relied upon a provision of the policy requiring any action to be filed within one year of the inception of the loss and moved for summary judgment. The trial court granted American States' motion,⁸⁷ but that judgment was reversed by the Indiana Court of Appeals.⁸⁸

The appeals court determined that a genuine issue of material fact existed concerning whether the one year limitation period was waived by American States.⁸⁹ It cited the general proposition that contractual limitation periods may be waived by an insurer if the insurer's conduct is sufficient to create a reasonable belief on the part of the insured that strict compliance with the policy provision will not be required.⁹⁰ The court of appeals stated that the course of dealings between the parties must be examined to determine whether the insurer engaged in any conduct or made any representation which would cause the insured reasonably to believe that the limitation period would not be enforced.⁹¹

to mislead the insured, but the insured's belief that the claim would be settled must have been reasonable. Note, too, that the mere pendency of the settlement negotiations between the insurance company and the insured will probably be a sufficient basis for invoking waiver or estoppel if the company allows those negotiations to continue past the expiration of the limitations period or to within a period of time sufficiently close to such expiration that the insured does not have adequate time thereafter to institute an action.

Id. at 349-50 (footnotes omitted).

⁸⁶455 N.E.2d 968 (Ind. Ct. App. 1983).

⁸⁷*Id.* at 969.

⁸⁸*Id.* at 971.

⁸⁹*Id.* at 970.

⁹⁰*Id.* (citing *Huff v. Travelers Indem. Co.*, 266 Ind. 414, 424, 363 N.E.2d 985, 991 (1977)).

⁹¹455 N.E.2d at 970.

When such a belief is fostered by the insurer, the contractual limitation period will be deemed waived.⁹² The Indiana Court of Appeals noted that the following factor might support a finding that American States had waived its limitation defense: The Wingenroths endorsed the first check more than one year after the inception of the loss but only after receiving assurances from American States that any subsequent damage would also be covered.⁹³

The court stated that summary judgment is improper when a factual dispute exists as to whether or not the insurer has created a reasonable belief in the mind of the insured that a waiver has occurred.⁹⁴ It acknowledged the general rule that, notwithstanding a waiver by the insurer, once the insured's claim has been denied, the insured must file the first-party action within a reasonable period.⁹⁵ The court stated that a factual determination of whether the insured filed the action within a reasonable time following the insurer's notification of claim denial must be made once the trial court finds that the insurer has waived the contract limitation period.⁹⁶

Thus, the following analysis has been identified by the Indiana Court of Appeals for determining whether or not a contract limitation provision will bar a first-party action for benefits under the policy:

(1) The trial court must determine whether the contract limitation period has expired;

(2) If the court finds that the limitation period has expired, it must determine whether or not the insurer intentionally relinquished its right to assert the limitation provision or whether the insurer's conduct or representations reasonably induced the insured to believe that the limitation period would not be asserted by the insurer;

(3) If the court finds that the insurer's conduct has resulted in a waiver of, or estoppel to assert, the limitation provision, the court must determine whether or not the insured has filed his first-party action within a reasonable time after being notified that his claim has been denied.

In a similar case, *Zehner v. MFA Insurance Co.*,⁹⁷ the insured sustained roof damage following a storm, and MFA denied her claim of loss. More than two years after the date of the loss, the insured filed a complaint against MFA, alleging a breach of the insurance contract. The trial court granted MFA's motion to dismiss because the insured had failed to file her action within twelve months of the date of

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.* at 970-71.

⁹⁷451 N.E.2d 65 (Ind. Ct. App. 1983).

loss.⁹⁸ After the insured's motion to correct errors was overruled, the insured abandoned any further appeal of her action.⁹⁹

Instead, the insured filed a second cause of action in a different trial court, alleging misrepresentation and negligence by MFA regarding coverage provisions in the policy.¹⁰⁰ The trial court dismissed the insured's action as an impermissible collateral attack upon the order of the previous trial court.¹⁰¹ The Indiana Court of Appeals affirmed the trial court and rejected the insured's attempt to distinguish allegations of misrepresentation and negligence from the insured's previous action based on a breach of contract.¹⁰²

The appeals court determined that the additional counts were barred by the limitation provision contained in the policy because those claims arose from the same insurance contract.¹⁰³ The court observed that "any form of action growing out of the insurance contract is governed by the limitation period contained in the policy."¹⁰⁴ The court stated:

"If a party chooses to call his cause of action misrepresentation, fraud, breach of warranty, negligence or a mistake, the terms of the policy as they are or should have been still control the obligation of the insurer to pay for a loss. An action to resolve a dispute as to the liability of an insurer to pay the loss, under these circumstances, is an action on the policy."¹⁰⁵

Thus, both tort and contract claims which arise from the same contract of insurance and which are the subject matter of the insured's first-party action will be governed by the contract limitation period contained in the policy.¹⁰⁶

3. *Duty to Give Sworn Statement.*—In *Standard Mutual Insurance Co. v. Boyd*,¹⁰⁷ the insured's dwelling was damaged by fire and the insured submitted a "Sworn Statement in Proof of Loss" to his insurer, Standard Mutual. Standard Mutual requested that the insured submit to a sworn oral examination under a policy provision which required the insured to submit to any examination "as may be reasonably required" by the insurer. The insured refused, however, to submit to an examination under oath because he believed himself to be a target defendant in an arson investigation and wanted to avoid giving a state-

⁹⁸*Id.* at 66.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.* at 67.

¹⁰²*Id.*

¹⁰³*Id.* at 67-68.

¹⁰⁴*Id.* at 68 (citation omitted).

¹⁰⁵*Id.* (quoting *Skrupky v. Hartford Fire Ins. Co.*, 55 Wis. 2d 636, 639, 201 N.W.2d 49, 51-52 (1972)).

¹⁰⁶451 N.E.2d at 68.

¹⁰⁷452 N.E.2d 1074 (Ind. Ct. App. 1983).

ment which subsequently might be used against him in a criminal prosecution. Standard Mutual notified the insured by letter that his refusal to submit to an oral examination constituted a breach of the policy and barred any claim for coverage. As a result, the insured brought an action against Standard Mutual to recover under the homeowners policy, and Standard Mutual filed a motion for summary judgment which the trial court denied.¹⁰⁸ Standard Mutual filed an interlocutory appeal, and the Indiana Court of Appeals reversed the trial court's denial of summary judgment.¹⁰⁹

On appeal, Standard Mutual argued that the insured was required to submit to an examination under oath as a condition precedent to the insurer's duty to honor the fire loss claim.¹¹⁰ The insured argued, however, that he did comply with the requirement to give a statement under oath by filing a "Sworn Statement in Proof of Loss" and that this statement provided sufficient information for Standard Mutual to investigate the merits of his claim.¹¹¹ Thus, the insured argued that his refusal to submit to further oral examination in no manner prejudiced Standard Mutual as to the fire loss claim.¹¹²

The court of appeals rejected the insured's arguments and stated that an insured's unexcused failure to appear and submit to examination under oath as required by the insurance contract constituted an absolute defense to an action on the policy by the insured.¹¹³ The court adopted the reasoning of *Restina v. Aetna Casualty & Surety Co.*¹¹⁴ and *Gross v. United States Fire Insurance Co.*,¹¹⁵ which rejected arguments that the insured's submission to examination under oath would jeopardize his constitutional rights upon standing accused of arson. The Indiana Court of Appeals reiterated that the constitutional immunity from self-incrimination does not absolve an insured from complying with the provision of the insurance contract which requires the insured to submit to an examination under oath, even though the insured is under indictment for arson for the burning of the property in question.¹¹⁶ The court

¹⁰⁸*Id.* at 1075.

¹⁰⁹*Id.* at 1079.

¹¹⁰*Id.* at 1076-77.

¹¹¹*Id.* at 1077.

¹¹²*Id.*

¹¹³*Id.* at 1078 (citing *Kisting v. Westchester Fire Ins. Co.*, 416 F.2d 967 (7th Cir. 1969); *Southern Guar. Ins. Co. v. Dean*, 252 Miss. 69, 172 So. 2d 553 (1965); *Lentini Bros. Moving & Storage Co. v. New York Prop. Ins. Underwriting Ass'n*, 76 A.D.2d 759, 428 N.Y.S.2d 684 (1980); *Hallas v. North River Ins. Co.* 279 A.D. 15, 107 N.Y.S.2d 359 (1951); *Gross v. United States Fire Ins. Co.*, 71 Misc. 2d 815, 337 N.Y.S.2d 221 (N.Y. Sup. Ct. 1972); *Restina v. Aetna Cas. & Sur. Co.* 61 Misc. 2d 514, 306 N.Y.S.2d 219 (N.Y. Sup. Ct. 1969)).

¹¹⁴61 Misc. 2d 574, 306 N.Y.S.2d 219 (N.Y. Sup. Ct. 1969).

¹¹⁵71 Misc. 2d 815, 337 N.Y.S.2d 221 (N.Y. Sup. Ct. 1972).

¹¹⁶452 N.E.2d at 1079.

concluded that the insured's submission to an examination under oath was a condition precedent to his recovery and that the constitutional immunity from being a witness against one's self does not apply where the insured seeks the benefits of a contract but refuses to comply with the conditions precedent to coverage.¹¹⁷

C. Life, Accident, and Health Insurance

In *Holtzclaw v. Bankers Mutual Insurance Co.*,¹¹⁸ the insured brought an action to compel Bankers Mutual to honor its medical insurance policy and to reimburse the insured for medical and hospital expenses she had incurred. The insured's health insurance policy provided that no misstatements, except fraudulent misstatements, could be used to void the policy or deny a claim for benefits after the policy had been in effect for two years.¹¹⁹ Bankers Mutual alleged that it had no duty to honor the insured's claim, even though the claim was filed after the two-year period, because the insured had fraudulently misrepresented certain facts in her insurance application. The policy application had requested that the insured state whether or not she had suffered from any disease of the kidneys, urinary tract, prostate, or pelvic organs during the ten years preceding application. In response to that question, the insured had answered in the negative. Bankers Mutual demonstrated that, three months prior to the filing of the application, the insured had been hospitalized and treated for coronary insufficiency and a narrow ureter. Additionally, the insured had been taking medication for a recurrent urinary tract infection. Eight months prior to applying for the insurance, the insured was hospitalized and diagnosed as having a chronic kidney ailment. It was further demonstrated that the insured had been

¹¹⁷*Id.*

¹¹⁸448 N.E.2d 55 (Ind. Ct. App. 1983). *Turner v. Estate of Turner*, 454 N.E.2d 1247 (Ind. Ct. App. 1983), *transfer denied*, Mar. 14, 1984, also presented significant insurance law questions during the survey period. For a discussion of this case, see Falender & Fruehwald, *Trusts and Decedents' Estates, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 435, 463-68 (1985).

¹¹⁹The time limitation clause stated:

"TIME LIMIT ON CERTAIN DEFENSES: (a) After two years from the date the coverage under this Policy commences with respect to any Covered Person no misstatements, *except fraudulent misstatements*, made by the applicant in the application for coverage under this Policy with respect to such person shall be used to void this Policy or to deny a claim for loss incurred with respect to such person after the expiration of such two-year period.

(b) No claim for loss incurred with respect to any Covered Person after two years from the date coverage under this Policy commences with respect to such person shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description had existed prior to the date coverage under this Policy commences with respect to such person."

448 N.E.2d at 58 (quoting the insurance policy).

hospitalized for surgical treatment of dysfunctional uterine bleeding.¹²⁰ Finally, the insured failed to identify several physicians which had treated her for these conditions as requested by the insurance application.¹²¹ The trial court granted summary judgment in favor of Bankers Mutual and concluded that the two-year time limitation clause did not preclude Bankers Mutual's averment that the insured's misrepresentations barred the duty to reimburse the insured's medical claim.¹²²

The Indiana Court of Appeals reversed the trial court judgment and determined that, while it was clear that the insured had misrepresented various facts on the insurance application, it was unclear whether those misrepresentations were intentional or innocent and unclear whether or not the insurance company relied upon them in issuing its policy.¹²³ Two types of misrepresentation were recognized in evaluating the insurance company's duty to indemnify under its health policy.¹²⁴ One type of misrepresentation is fraudulent, made knowingly by the insured or with a reckless disregard for its falsity.¹²⁵ The insurance company must rely upon the fraudulent misrepresentation to its detriment in order to avoid its duty to indemnify.¹²⁶ This type of fraudulent misrepresentation is an exception to the two-year limitation clause of the policy, thus permitting the insurance company to void the policy even though the claim is filed after the two-year period has expired.¹²⁷ The second type of misrepresentation is an innocent misrepresentation, one in which the insured unknowingly gives false information in the application of insurance because of a misunderstanding of the questions and terms involved in the application or because of a misunderstanding of a medical condition which might fall within the scope of the insurance company's questionnaire.¹²⁸ This second type of misrepresentation is the type contemplated by the two-year limitation, and it does not entitle the insurance company to avoid its duty to indemnify.¹²⁹

The Indiana Court of Appeals also determined that the insured's state of mind and the insurance company's reliance thereon were questions of fact, inappropriate for determination by summary judgment.¹³⁰ Bankers Mutual's position that all misrepresentations are per se fraudulent and a basis for voiding the contract was rejected.¹³¹ The court stated that misrepresentations are material to the insurer's risk only when a truthful answer would lead the insurer to decline issuing insurance or to charge

¹²⁰*Id.* at 57.

¹²¹*Id.* at 58.

¹²²*Id.*

¹²³*Id.* at 59.

¹²⁴*Id.* at 58-59.

¹²⁵*Id.* at 59.

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸*Id.* at 58-59.

¹²⁹*Id.*

¹³⁰*Id.* at 59.

¹³¹*Id.*

a higher premium.¹³² Therefore, while two types of misrepresentation might exist, only the fraudulent type of misrepresentation will bar the insurance company's duty to provide coverage under its health policy.¹³³

D. Casualty and Automobile Insurance

In *Michigan Mutual Insurance Co. v. Combs*,¹³⁴ the insured was driving his 1970 Volkswagen when it became disabled and he was forced to move it to a curb for repairs. While the insured's brother was working on the engine, another vehicle struck the Volkswagen from the rear, causing injury to the insured's brother. The driver of the other automobile was not insured, and a claim was filed with Michigan Mutual under the insured's uninsured motorist policy. That policy defined an "insured" as "any . . . person . . . occupying an insured automobile."¹³⁵ The policy also defined "occupying" as "in or upon or entering into or alighting from."¹³⁶ Michigan Mutual filed a declaratory judgment action seeking a determination that the insured's brother was not "occupying" the automobile at the time of injury. The trial court, however, granted summary judgment in favor of the insured's brother and ordered Michigan Mutual to pay the brother \$15,000, the full amount of uninsured motorist coverage under the policy.¹³⁷

The Indiana Court of Appeals affirmed the trial court's judgment and concluded that the brother's contact with the automobile came within the definition of "upon" as used in the uninsured motorist policy.¹³⁸ The court of appeals rejected case authority from another jurisdiction which held that an individual is "in or upon" a vehicle at the moment of injury only if he has some connection such as owner or passenger with the occupying vehicle.¹³⁹ The court noted several instances in which a nonowner or nonpassenger might have sufficient contact with an automobile to invoke the coverage provisions of the policy: First, whenever evidence of physical contact with the insured's vehicle can be demonstrated, the "physical contact" rule set forth in *United Farm Bureau Mutual Insurance Co. v. Pierce*¹⁴⁰ might require

¹³²*Id.* at 58 (citing *New York Life Ins. Co. v. Kuhlenschmidt*, 213 Ind. 212, 11 N.E.2d 673 (1937); *American Family Mut. Ins. Co. v. Kivela*, 408 N.E.2d 805 (Ind. Ct. App. 1980).

¹³³448 N.E.2d at 58.

¹³⁴446 N.E.2d 1001 (Ind. Ct. App. 1983).

¹³⁵*Id.* at 1002 (quoting the insurance policy) (court's emphasis deleted).

¹³⁶*Id.* (quoting the insurance policy) (court's emphasis deleted).

¹³⁷*Id.* at 1003.

¹³⁸*Id.* at 1007.

¹³⁹*Id.* at 1006 (citing *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Bristow*, 207 Va. 381, 150 S.E.2d 125 (1966)).

¹⁴⁰152 Ind. App. 387, 283 N.E.2d 788 (1972).

coverage.¹⁴¹ Second, the “upon” provision might be satisfied when a sufficient relationship exists between the nonowner claimant and the automobile, as when the claimant is injured while putting chains on a tire, paying a taxicab fare, loading a stereo into the vehicle’s trunk, or exchanging accident information while standing in front of the insured automobile.¹⁴²

The court of appeals concluded that any ambiguity in the term “upon” should be resolved against the insurer and in favor of coverage.¹⁴³ It stated, however, that the insurance company may write its insurance policies so as to exclude coverage from claimants who fail to establish a passenger or operator status.¹⁴⁴

Next, in *Indiana Lumbermens Mutual Insurance Co. v. Vincel*,¹⁴⁵ Indiana Lumbermens appealed from a declaratory judgment in favor of the insured and the insured’s son. The trial court extended the uninsured motorist provisions of an automobile policy to include the son, who, as a pedestrian, was injured when struck by an automobile driven by an uninsured motorist. The son had been living with his father at the time of the accident, and the son owned an uninsured vehicle. The father’s automobile policy provided uninsured motorist coverage for any relative of the insured.¹⁴⁶ The policy defined “relative” as “a person related to the named insured by blood, marriage or adoption who is a

¹⁴¹446 N.E.2d at 1005. The “physical contact” rule provides that any evidence of physical contact with the insured vehicle before injury is sufficient to establish that the injured person was upon it. *Id.*

¹⁴²*Id.* (citing *Cocking v. State Farm Mut.*, 6 Cal. App. 3d 965, 86 Cal. Rptr. 193 (1970) (putting chains on a tire); *Wolf v. American Cas. Co.*, 2 Ill. App. 2d 124, 118 N.E.2d 777 (1954) (exchanging accident information); *Allstate Ins. Co. v. Flaumenbaum*, 62 Misc. 2d 32, 308 N.Y.S.2d 447 (N.Y. Sup. Ct. 1970) (paying taxi fare); *Robson v. Lightning Rod Mut. Ins. Co.*, 59 Ohio App. 2d 261, 393 N.E.2d 1053 (1978) (loading vehicle’s trunk)).

¹⁴³446 N.E.2d at 1007.

¹⁴⁴*Id.* at 1006.

¹⁴⁵452 N.E.2d 418 (Ind. Ct. App. 1983).

¹⁴⁶*Id.* at 419-20. The policy defined “persons insured” as follows:

“Under the Liability and Medical Expense Coverages, the following are insureds:

(a) with respect to an owned automobile,

(1) the named insured,

(2) any other person using such automobile with the permission of the named insured . . .

(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a) (1) or (2) above;

(b) with respect to a non-owned automobile,

(1) the named insured,

(2) a relative, but only with respect to a private passenger automobile or utility trailer,

provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

resident of the same household, *provided neither such relative nor his spouse owns a private passenger automobile.*”¹⁴⁷ The trial court concluded that the son was an insured within the meaning of the policy, that the attempted exclusion was contrary to law and thus constituted an unreasonable restriction on uninsured motorist coverage.¹⁴⁸

The Indiana Court of Appeals reversed and ordered that judgment be entered in favor of the insurance company.¹⁴⁹ The court of appeals determined that the son was not an insured because he was not a relative as defined by the policy.¹⁵⁰ It further determined that the exclusion from the uninsured motorist coverage was not an unreasonable restriction¹⁵¹ under Indiana Code section 27-7-6-2, which provides in part:

“Automobile insurance policy means a policy delivered or issued for delivery in this state or covering a motor vehicle required to be registered in this state providing coverage for bodily injury and property damage liability, medical payments, and uninsured motorists or any combination thereof and insuring as the named insured a natural person or more than one natural persons related to each other resident of the same household”¹⁵²

The court rejected the insured’s contention that this statute establishes a minimum category of persons who must be insured under automobile policies in Indiana and that the policy’s definition of “relative” contravened the statute.¹⁵³ The court of appeals stated that the primary purpose of the statute is to protect policyholders against termination of coverage except in the manner authorized by the uninsured motorist legislation.¹⁵⁴ The court noted that the language upon which the trial court and the insured relied did not define the class of persons who must be insured in automobile policies generally or those who must be afforded uninsured motorist coverage in particular.¹⁵⁵

(3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b)(1) or (2) above.

Under the Uninsured Motorists Coverage, the following are insureds:

(a) *the named insured and any relative,*

(b) any other person while occupying an insured automobile,

(c) any person, with respect to damages he is entitled to recover because of bodily injury to which this coverage applies sustained by an insured under (a) or (b) above.”

Id. (quoting the insurance policy).

¹⁴⁷*Id.* at 420.

¹⁴⁸*Id.*

¹⁴⁹*Id.* at 426.

¹⁵⁰*Id.* at 421.

¹⁵¹*Id.*

¹⁵²*Id.* at 422 (quoting IND. CODE § 27-7-6-2 (1982)).

¹⁵³452 N.E.2d at 422.

¹⁵⁴*Id.* (citing *American Family Ins. Group v. Ford*, 155 Ind. App. 573, 293 N.E.2d 524 (1973)).

¹⁵⁵452 N.E.2d at 422.

The court of appeals also stated that under Indiana law there is no requirement that relatives living in the same household be covered by each other's automobile liability policy, only that automobile liability insurers must provide coverage to the owner of an automobile being insured and to persons using the insured automobile with that owner's permission.¹⁵⁶ The insurance company also must provide uninsured motorist protection within the liability policy for all persons insured thereunder.¹⁵⁷ The court stated,

“[w]e decline to extend the public policy . . . to allow a member of a family to purchase one liability policy and claim total coverage thereunder for the entire family while vastly increasing the risk to his or her insurer by knowingly owning and operating a fleet of uninsured vehicles upon the highways.”¹⁵⁸

Thus, Indiana Code section 27-7-6-2 was deemed irrelevant to the coverage requirements of the uninsured motorist statutes.¹⁵⁹ Since the son did not meet the contractual definition of “relative” as set forth in the uninsured motorist section of the policy, the son could not claim coverage under his father's policy.¹⁶⁰

Similarly, in *Connell v. American Underwriters, Inc.*,¹⁶¹ the Indiana Court of Appeals rejected the claim of a daughter of an insured for uninsured motorist coverage when the daughter was injured in a two-car accident with an uninsured motorist approximately one month after she had allowed the insurance on her personal automobile to expire. The trial court granted summary judgment for the insurer, and the court of appeals affirmed that judgment.¹⁶²

The appellate court determined that the daughter was not an insured person under the liability section of her father's policy and could not benefit from the uninsured motorist coverage.¹⁶³ The court rejected the daughter's argument that the Uninsured Motorists Statute required that her father's policy be construed to insure all relatives and residents of

¹⁵⁶*Id.* at 423 n.4 (citing IND. CODE § 27-1-13-7 (1976) (current version at IND. CODE § 27-1-13-7 (1982))).

¹⁵⁷452 N.E.2d at 425 (quoting *Lewis v. American Family Ins. Group*, 555 S.W.2d 579 (Ky. 1977)). The Lewis court cited Indiana Code section 27-7-5-1 which states that anyone who is an insured must be afforded uninsured motorist protection but it does not expand the class of persons that must be considered to be insureds beyond the requirements of Indiana Code section 27-1-13-7 (1982). Indiana Code section 27-7-5-1 was repealed and recodified at Indiana Code section 27-7-5-2 (1982). Act of Feb. 19, 1982, Pub. L. No. 166-1982, 1982 Ind. Acts 1237.

¹⁵⁸452 N.E.2d at 426 (quoting *France v. Liberty Mut. Ins. Co.*, 380 So. 2d 1155, 1156 (Fla. Dist. Ct. App. 1980)).

¹⁵⁹452 N.E.2d at 422.

¹⁶⁰*Id.* at 426.

¹⁶¹453 N.E.2d 1028 (Ind. Ct. App. 1983).

¹⁶²*Id.* at 1029.

¹⁶³*Id.* at 1031.

the father's household.¹⁶⁴ The court also rejected the daughter's argument that the ambiguity between the definition of an insured in the liability section of the policy and the definition of an insured in the uninsured motorist section should be construed in favor of coverage and against American Underwriters.¹⁶⁵ The court concluded that automobile liability insurers need only provide liability coverage for the owner of the insured automobile and for persons using the automobile with that owner's permission.¹⁶⁶ All coverage beyond the statutory requirements is a matter of contract between the parties.¹⁶⁷

Finally, in *Dravet v. Vernon Fire & Casualty Insurance Co.*,¹⁶⁸ the court of appeals examined a provision under an automobile insurance policy that excluded uninsured motorist coverage whenever the insured made any settlement with a person or organization who might be liable for the loss, without first obtaining the written consent of the company.¹⁶⁹ The trial court found that the insureds had violated a condition of the policy by settling their claim and dismissing their action against the individuals who had allegedly caused their injuries. The trial court issued a declaratory judgment in favor of the insurer, finding no liability owed to the insureds for any claim arising from the accident.¹⁷⁰

The Indiana Court of Appeals affirmed the trial court's judgment and held that the policy exclusion did not unreasonably limit the protections afforded an insured under the Uninsured Motorist Statute.¹⁷¹ The court of appeals acknowledged, but rejected, a line of cases from other jurisdictions which had refused to enforce such policy exclusions because they diminish the protection afforded by uninsured motorist statutes.¹⁷² Rather, the court stated that the requirement that the insured obtain written consent from the insurance company before settling a claim with anyone who may be liable for the accident is designed to

¹⁶⁴*Id.* The Uninsured Motorists Statute in force at the time this case arose was Indiana Code section 27-7-5-1 (1976) (current version at IND. CODE § 27-7-5-2 (1982)).

¹⁶⁵453 N.E.2d at 1031.

¹⁶⁶*Id.* *Indiana Lumbermens Mut. Ins. Co. v. Vincel*, 452 N.E.2d 418, 423-24 (Ind. Ct. App. 1983) (citing; IND. CODE § 27-1-13-7 (1982)).

¹⁶⁷453 N.E.2d at 1031.

¹⁶⁸454 N.E.2d 440 (Ind. Ct. App. 1983).

¹⁶⁹*Id.* at 441. The provision of the policy provided:

"Exclusions: This policy does not apply under Part IV [uninsured motorist coverage]:

* * *

(b) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this coverage shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor"

Id. (quoting the insurance policy).

¹⁷⁰*Id.*

¹⁷¹*Id.* at 442.

¹⁷²*Id.*

protect the insurance company's right of subrogation.¹⁷³ The court concluded that such a requirement would in no way diminish coverage of the Uninsured Motorist Statute.¹⁷⁴

E. Statutory Developments

The Indiana General Assembly passed a number of laws affecting the insurance industry during the survey period.¹⁷⁵

1. *The Guest Statute.*—The 103rd Indiana General Assembly partially repealed the Guest Statute, which barred any negligence action by a guest passenger against the owner, operator, or person responsible for the operation of an automobile unless the guest passenger's injury was caused by the wanton or willful misconduct of the responsible operator.¹⁷⁶ Under the new legislation, most guest passengers who are not related to the owner or operator are not barred from bringing a negligence action. However, a parent, spouse, child or stepchild, brother or sister, or hitchhiker being transported without payment in a motor vehicle is still barred from bringing a negligence action against the owner or

¹⁷³*Id.*

¹⁷⁴*Id.*

¹⁷⁵Legislation enacted which affected the insurance industry included the following: Act of Mar. 1, 1984, Pub. L. No. 68-1984, 1984 Ind. Acts 925 (codified at IND. CODE § 9-3-3-1 (Supp. 1984)) (amending IND. CODE § 9-3-3-1 (1982) to partially repeal the Guest Statute except as to immediate family and hitchhikers); Act of Mar. 1, 1984, Pub. L. No. 101-1984, 1984 Ind. Acts 1035 (codified at IND. CODE § 16-4-8-7 (Supp. 1984)) (amending IND. CODE § 16-4-8-6 (Supp. 1983) to clarify who may obtain a copy of an inpatient's health records when the inpatient is either an unemancipated minor or incompetent); Act of Feb. 29, 1984, Pub. L. No. 138-1984, 1984 Ind. Acts 1227 (codified at IND. CODE § 27-1-7-19 (Supp. 1984)) (amending IND. CODE § 27-1-7-19 (1982) to raise the maximum interest rate at which mutual insurance companies may borrow money from 6% to 10%); Act of Feb. 29, 1984, Pub. L. No. 139-1984, 1984 Ind. Acts 1227 (codified at IND. CODE § 27-2-13-1 to -4 (Supp. 1984)) (amending IND. CODE § 27-2-13-1 (Supp. 1983) to add an arson investigator to the definition of "authorized agency" under the Arson Immunity Act and to require that an insurer provide information requested to the requesting authorized agency); Act of Feb. 29, 1984 Pub. L. No. 140-1984, 1984 Ind. Acts 1229 (codified at IND. CODE § 27-8-11-1 to -4 (Supp. 1984)) (adding a new chapter which allows insurers to enter into agreements with health care providers relating to charges for services or reductions for inappropriate care; allows insurers to provide incentives for health care providers', services and to deny reimbursements for expenses of services not rendered by providers); Act of Feb. 29, 1984, Pub. L. No. 172-1984, 1984 Ind. Acts 1462 (codified at IND. CODE § 34-4-30-1, -2 (Supp. 1984); IND. CODE § 34-4-34-1, -2 (Supp. 1984)) (adding a provision which allows claimant to seek punitive damages even though defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action; adopted clear and convincing evidence standard to support recovery of punitive damages in *all* civil actions); Act of Mar. 5, 1984, Pub. L. No. 174-1984, 1984 Ind. Acts 1468 (codified at IND. CODE § 34-4-33-1 to -13 (Supp. 1984)) (amending Comparative Fault Act as codified at IND. CODE § 34-4-33-1 to -8 (Supp. 1983)).

¹⁷⁶IND. CODE § 9-3-3-1 (1982).

driver.¹⁷⁷ Even those who remain covered by the Guest Statute are able to file suit for their injuries or death caused by the wanton or willful misconduct of the operator, owner, or person responsible for the operation of the automobile.¹⁷⁸ Thus, any unpaying passenger, except an immediate family member or a hitchhiker, may bring a negligence action in order to recover for his personal bodily injuries, whether the guest is being transported for social or business purposes.¹⁷⁹

2. *Comparative Fault Act*.—In 1983, Indiana enacted comparative fault legislation,¹⁸⁰ which provided, in part, that a percentage of fault may be assigned to the plaintiff when comparative fault is at issue.¹⁸¹ That Act, which went into effect on January 1, 1985, will have a tremendous impact upon the traditional adjustment and settlement mechanisms used by the insurance industry.¹⁸² During this survey period, the 103rd General Assembly enacted significant amendments to the Comparative Fault Act.¹⁸³ While this Article will not attempt to analyze the ramifications of those changes, it is important to note the following amendments: (1) the amendments have removed "strict liability," "breach of warranty," and "misuse" from the definition of "fault" under the Act;¹⁸⁴ (2) the Act now permits a defendant to affirmatively plead a nonparty defense when a nonparty may be liable to the claimant in part or in whole for the damages claimed;¹⁸⁵ (3) the definition of "nonparty" specifically excludes the employer of a claimant;¹⁸⁶ and (4) if a subrogation claim or lien, other than a lien arising under the Workmen's Compensation Act, arises out of the payment of medical expenses or benefits in respect to the claimant's claim for personal injuries, and the claimant's recovery is diminished by comparative fault or by reason of the uncollectibility of the full value of the claim for personal injuries, then the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished.¹⁸⁷

¹⁷⁷IND. CODE § 9-3-3-1(b) (Supp. 1984).

¹⁷⁸*Id.*

¹⁷⁹*Id.*

¹⁸⁰Act of Apr. 21, 1983, Pub. L. No. 317-1983, § 1, 1983 Ind. Acts 1930, 1930-33 (codified at IND. CODE § 34-4-33-1 to -8 (Supp. 1983)). See generally Arthur, *Insurance, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 223, 242-43 (1984).

¹⁸¹Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 5, 1983 Ind. Acts 1930, 1931 (codified at IND. CODE § 34-4-33-5(a)(1) (Supp. 1983)), amended by IND. CODE § 34-4-33-5 (Supp. 1984).

¹⁸²See generally *Symposium on Indiana's Comparative Fault Act*, 17 IND. L. REV. 687 (1984).

¹⁸³Act of Mar. 5, 1984, Pub. L. No. 174-1984, Ind. Acts 1468 (codified at IND. CODE § 34-4-33-1 to -13 (Supp. 1984)).

¹⁸⁴IND. CODE § 34-4-33-2(a) (Supp. 1984).

¹⁸⁵*Id.* § 34-4-33-10.

¹⁸⁶*Id.* § 34-4-33-2(a).

¹⁸⁷*Id.* § 34-4-33-12.

3. *Inpatient's Right to Obtain Health Records.*—The legislature also amended Indiana Code section 16-4-8-7,¹⁸⁸ which prohibits a patient from obtaining a copy of his health records while he is an inpatient of a hospital, health facility, or facility licensed under Indiana Code section 16-14-1 or Indiana Code section 16-16-1.¹⁸⁹ The amendment clarifies who may obtain a copy of a patient's health records when the inpatient is either an unemancipated minor or incompetent.¹⁹⁰ The statute provides that with respect to the unemancipated minor¹⁹¹ or incompetent,¹⁹² a parent, guardian, or next of kin is entitled to obtain a copy of the health records of the inpatient. When the inpatient is competent and requests that her health records be released, a spouse, parent, or next of kin may obtain a copy of the records.¹⁹³

4. *Arson Immunity Act.*—The Indiana General Assembly amended the Arson Immunity Act¹⁹⁴ and added "an arson investigator" to the definition of an "authorized agency" under the Act.¹⁹⁵ The amendment defines an arson investigator as "an officer of a unit of local government whose duties include the investigation of arson."¹⁹⁶ The statute requires that an insurer furnish all information requested by an authorized agency under the Act.¹⁹⁷ Finally, the Act states that an insurer who provides to any authorized agent notice that the insurer believes the fire was caused by arson will satisfy the requirements of the Act.¹⁹⁸ Only notice to the State Fire Marshall, however, will satisfy the requirements of Indiana Code section 22-11-5-10.¹⁹⁹

Further, during the survey period, the Attorney General of the State of Indiana issued an opinion which addressed whether or not arson

¹⁸⁸IND. CODE § 16-4-8-7 (Supp. 1984).

¹⁸⁹*Id.*

¹⁹⁰*Id.*

¹⁹¹*Id.* § 16-4-8-7(1).

¹⁹²*Id.* § 16-4-8-7(2).

¹⁹³*Id.* § 16-4-8-7(3).

¹⁹⁴Act of Feb. 29, 1984, Pub. L. No. 139-1984, 1984 Ind. Acts 1227 (codified at IND. CODE § 27-2-13-1 to -4 (Supp. 1984)).

¹⁹⁵IND. CODE § 27-2-13-1(a)(5) (Supp. 1984).

¹⁹⁶*Id.* § 27-2-13-1(d).

¹⁹⁷*Id.* § 27-2-13-2(b).

¹⁹⁸*Id.* § 27-2-13-3(b).

¹⁹⁹Indiana Code section 22-11-5-10 (1982) provides:

Every fire insurance company transacting business in this state is hereby required to file with the state fire marshal, a report of all fires of a suspicious origin. The report shall be made immediately and shall contain such facts and circumstances as shall come to their knowledge tending to establish the cause or origin of the fire. Such report shall be in addition to and not in lieu of any report or reports that such companies may be required to make by any law of the state to the auditor of state or other state officer.

Id.

investigation files maintained by the Investigation Division of the State Fire Marshall's office are exempt from public disclosure under Indiana's Public Records Law, and whether such files must be disclosed to insurance companies.²⁰⁰ The Attorney General cited Indiana's liberal policy supporting full and complete disclosure of governmental records to the public.²⁰¹ He noted, however, that certain documents have been exempted from the broad public disclosure requirements,²⁰² while other documents may be disclosed at the discretion of the public agency.²⁰³ The Attorney General stated that arson investigation records may be released at the State Fire Marshall's discretion, noting that investigatory files of law enforcement agencies are within the category of files that may be released at the agency's discretion.²⁰⁴ Yet, inasmuch as the Arson Immunity Act mandates disclosure of relevant information to certain insurers, the State Fire Marshall must disclose this information upon request.²⁰⁵ As such, only information that is relevant to the insurer's particular arson investigation must be disclosed. As to all other information gathered by the State Fire Marshall, it is discretionary with that agency as to whether or not such records should be released to an insurance company.²⁰⁶

²⁰⁰Op. Att'y Gen. No. 84-6 (May 14, 1984).

²⁰¹*Id.* The Opinion cited Indiana Code section 5-14-3-1 (Supp. 1984) which provides:

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

Id.

²⁰²IND. CODE § 5-14-3-4(a) (Supp. 1984) (exempting from the public disclosure requirements, among others, documents declared confidential by state statute, records containing trade secrets, and confidential financial information).

²⁰³IND. CODE § 5-14-3-4(b) (Supp. 1984).

²⁰⁴Op. Att'y Gen. No. 84-6 (May 14, 1984).

²⁰⁵*Id.* (citing IND. CODE §§ 27-2-13-1 to -4 (Supp. 1984)).

²⁰⁶Op. Att'y Gen. No. 84-6 (May 14, 1984).

IX. Labor Law

EDWARD P. ARCHER*

A. *Arbitration as an Alternative Forum under the State Personnel Act.*

It was a relatively uneventful year in the Indiana appellate courts for state law matters pertaining to labor relations. However, there were two significant decisions which may severely undermine state employee access to arbitration as an alternative forum for resolution of disputes filed under the State Personnel Act.

The State Personnel Act¹ provides that an employee may file a complaint "if his status of employment is involuntarily changed or if he deems conditions of employment to be unsatisfactory."² Further, it provides for a complaint appeal procedure consisting of several steps leading to arbitration. Those procedural steps include complaint to the employee's immediate supervisor, intermediate supervisor, appointing authority, the state personnel director, and then to the State Employee's Appeal Commission.³ The Act then provides as follows:

If the recommendation of the commission is not agreeable to the employee, the employee, within fifteen (15) calendar days from receipt of the commission recommendation, may elect to submit the complaint to arbitration. . . . The commissioner of labor shall prepare a list of three (3) impartial individuals trained in labor relations, and from this list each party shall strike one (1) name. The remaining arbitrator shall consider the issues which were presented to the commission and shall afford the parties a public hearing with the right to be represented and to present evidence. The arbitrator's findings and recommendations shall be binding on both parties and shall immediately be instituted by the commission.⁴

In construing this portion of the Act in *Rockville Training Center v. Peschke*,⁵ the Indiana Court of Appeals distinguished between cases

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¹IND. CODE §§ 4-15-2-1 to -43 (1982 & Supp. 1984).

²*Id.* § 4-15-2-35 (1982).

³*Id.* § 4-15-1.5-1.

⁴*Id.* § 4-15-2-35.

⁵450 N.E.2d 90 (Ind. Ct. App. 1983). In *Rockville*, the company appealed the trial

in which the Commission finds merit in the employee's complaint and issues a recommended remedy which is not to the employee's satisfaction and those cases in which the Commission finds that the employee's complaint is without merit.⁶

The court focused heavily on the language in the Act: "If the *recommendation* of the commission is not agreeable to the employee, the employee . . . may elect to submit the complaint to arbitration."⁷ The court noted that "[t]he fact a recommendation is made presumes a decision that the complaint is meritorious, both procedurally and substantively."⁸ The court reasoned, "if the decision is that the complaint is without merit . . ., there is, of course, no recommendation. There is only a decision. Such a decision, *i.e.*, one without a recommendation, is not subject to arbitration."⁹ The court concluded that "[t]his construction of the statute fulfills our obligation to give meaning to every word."¹⁰

A careful look at the Act raises considerable question as to whether or not the court did give meaning to every word of the statute. The court determined that a recommendation should be distinguished from a decision.¹¹ Through this distinction the court restricts employee access to arbitration to only those cases in which the Commission finds merit

court's affirmance of an arbitration award in favor of employees who were required to attend daily meetings without overtime compensation.

⁶*Id.* at 92.

⁷IND. CODE § 4-15-2-35 (1982) (emphasis added).

⁸450 N.E.2d at 92.

⁹*Id.* The *Rockville* approach to arbitration was not signaled by earlier cases where decisions that the employee's complaint was unmeritorious were taken to arbitration.

¹⁰*Id.* (citations omitted).

¹¹*Id.* The court's narrow reading of the Act in *Rockville*, so as to exclude from arbitration those cases in which the Commission finds no merit in the employee's complaint, is not advanced by the decision cited by the court as "not inconsistent" with its reasoning. In *Wagner v. Kendall*, 413 N.E.2d 302 (Ind. Ct. App. 1980), the court determined that an arbitration award under the Act is subject to judicial review via the Uniform Arbitration Act. See IND. CODE § 34-4-2-13 (1976) (current version at IND. CODE § 34-4-2-13 (1982)). The court in *Rockville* recognized that an adverse decision on the merits, as opposed to an unsatisfactory remedy, was submitted for arbitration by employees in *Wagner*. 450 N.E.2d at 90. However, the *Rockville* court explained this inconsistency by noting that the issue was not before the *Wagner* court. *Id.* at 92-93.

Also worthy of note is *Indiana Veteran's Home v. Orr*, 439 N.E.2d 1374 (Ind. Ct. App. 1982). In *Indiana Veteran's Home*, decided by the same court with the same judge writing for the court as in *Rockville*, the court addressed the authority of an arbitrator to make an award in favor of state employees when the employees' complaint involved merit raises. *Id.* at 1375. After receiving an unfavorable decision on the merits from the State Employees Appeals Commission, the employees in *Indiana Veteran's Home* were allowed to submit their claim for arbitration under the Act. *Id.* at 1376. The court stated:

[W]e conclude the employees met the requirements of I.C. 4-15-2-35 and were

in the employee complaint and recommends a remedy unsatisfactory to the employee. No such distinction is apparent within the Act.

The Act subdivides cases decided by the Commission into two categories: (1) cases in which the Commission finds action taken on the basis of politics, religion, sex, age, race, or membership in an employee organization and (2) all other cases.¹² Regarding all other cases, the Act provides that “the appointing authority shall follow the recommendation of the commission”¹³ which could include a recommendation that the complaint be dismissed for lack of merit. Consequently, there is no basis for the court’s critical premise that “[t]he fact [that] a recommendation is made presumes a decision that the complaint is meritorious”¹⁴ Such a premise gives no meaning to the unambiguous statutory language which groups “all other cases”¹⁵ together and requires the appointing authority to follow the Commission’s recommendation whether or not the complaint is found to be meritorious.

The Act further provides that “[i]f the recommendation of the commission is not agreeable to the employee, the employee . . . may elect to submit the complaint to arbitration.”¹⁶ Recommendations to dismiss the complaint as unmeritorious would clearly fall within the scope of recommendations not agreeable to the employee and should therefore be subject to the employee’s election to submit the complaint to arbitration. Contrary to the appellate court’s decision, the Act places no limitation on the employee’s access to arbitration based on the type of unfavorable recommendation made by the Commission.

Allowing submission of unmeritorious complaints to arbitration would seem to comply with the Indiana Supreme Court’s outline of the Act’s complaint process in *State ex rel. Pearson v. Gould*.¹⁷ The court described the process as a step-by-step progression through “the state employees appeals commission . . . and finally binding arbitration.”¹⁸ The court

entitled to submit their complaint to the State Employees Appeals Commission. Thereafter, by the provisions of that same statute, the employees were entitled to submit their complaint to arbitration, *i.e.*, the arbitrator had “jurisdiction.”⁴³⁹ N.E.2d at 1376; *see also* *State v. Martin*, 460 N.E.2d 986 (Ind. Ct. App. 1984) (court noted the *Rockville* decision but refused to allow the state to contest the arbitration award because the issue was not raised in a timely manner).

¹²IND. CODE § 4-15-2-35 (1982).

¹³*Id.*

¹⁴450 N.E.2d at 92.

¹⁵“All other cases” are those in which discrimination is not at issue. *See supra* note 12 and accompanying text.

¹⁶IND. CODE § 4-15-2-35 (1982).

¹⁷437 N.E.2d 41 (Ind. 1982). Although the court outlined the Act’s complaint procedure, the main thrust of the opinion concerned alleged unauthorized practice of law before the State Employees Appeals Commission.

¹⁸*Id.* at 42.

stated that "if the *decision* of the commission is not agreeable to the employee, the employee may elect to go further and submit the complaint to arbitration *which is the last step in the complaint process*."¹⁹ Although the court in *Gould* did not specifically address the construction of the Act's complaint process, the decision acknowledged an appeal to arbitration from unsatisfactory Commission decisions, not just unsatisfactory Commission remedy recommendations in decisions in which the Commission found merit in the employee's complaint.²⁰

A statutory construction allowing arbitration of unmeritorious complaints, as well as meritorious complaints which are disagreeable to the employee, is also a common sense construction. While, as an arbitrator, I confess to a bias in favor of the arbitration process,²¹ arbitration has become widely accepted as a desirable procedure for the relatively quick, inexpensive, and equitable resolution of labor disputes.²² It makes little sense to afford employees the option to choose arbitration over the more expensive and slower judicial review process only in cases in which the Commission has found merit in their complaints. Clearly, employees have at least as great an interest in a quick, inexpensive, and equitable resolution of cases in which the Commission has found no merit in their complaints as they have for cases in which merit has been found but only an unsatisfactory remedy has been offered.

The problems raised by *Rockville*²³ are compounded by *State v. Van Ulzen*.²⁴ The Indiana Court of Appeals in *Van Ulzen* noted the opinion in *Rockville* and used the decision to even further restrict state employee election of the arbitration forum under the Act.

In *Van Ulzen*, the Commission had rejected the employee's complaint as having "failed to state a claim upon which relief [could] be granted."²⁵ The court found that the Commission's determination that the complaint

¹⁹*Id.* (emphasis added).

²⁰*Id.*

²¹The author is a member of the National Academy of Arbitrators and he is included on the panels of the Federation of Mediation and Conciliation Service and the American Arbitration Association.

²²In a series of cases in 1960, the United States Supreme Court examined the validity of arbitration as opposed to litigation. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). Specifically, in *Warrior & Gulf*, the Court found that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-83 (footnote omitted). See also *Wagner v. Kendall*, 413 N.E.2d 302 (Ind. Ct. App. 1980). In dictum the *Wagner* court noted that the purpose of arbitration is to allow disposition more expeditiously and with more facility than litigation.

²³450 N.E.2d at 90.

²⁴456 N.E.2d 459 (Ind. Ct. App. 1983).

²⁵*Id.* at 462 (quoting from the Commission's decision).

was unmeritorious was appealable under the Administrative Adjudication Act (AAA)²⁶ and went on to state:

If the decision of the Commission was arbitrary and capricious, contrary to constitutional right, in excess of statutory jurisdiction, without observance of procedure required by law, or unsupported by substantial evidence, then the trial court has the power to remand the case and compel the Commission to (1) conduct a hearing; and (2) possibly, to allow arbitration of the claim.²⁷

Considering the court's finding, it apparently restricted employee access to the arbitration forum to those cases in which the employee exhausts the appellate procedures under the AAA and obtains an order allowing arbitration of the claim. If such a restriction was the court's intention, it is totally unsupported by the State Personnel Act.²⁸ The Act clearly affords the employee the option of electing to submit the complaint to arbitration "[i]f the recommendation of the commission is not agreeable to the employee."²⁹ The Act provides no requirement that an employee exhaust AAA appeal procedures or obtain a court order to arbitrate.³⁰ Such a construction of the Act would be inconsistent with its requirement that the employee elect to submit his claim to arbitration "within fifteen (15) calendar days from receipt of the commission recommendation."³¹ Clearly, the appeal process could not be exhausted within such a short period. Thus, it is logical to conclude that the legislature intended that the employee have the right to make a timely election either to appeal adverse Commission decisions or recommendations under the AAA, or to submit the complaint to arbitration.³²

Perhaps the *Van Ulzen* court did not intend its decision to restrict employee access to arbitration to only those cases in which court orders are obtained through the judicial review process under the AAA. The court cites the *Rockville* case to bolster its decision.³³ If the *Rockville* decision is correct, Van Ulzen was properly denied access to arbitration because the Commission decided that the complaint had no merit, not because a meritorious complaint was submitted and the employee deemed the remedy unsatisfactory.³⁴

²⁶IND. CODE §§ 4-22-1-1 to -30 (1982 & Supp. 1984).

²⁷456 N.E.2d at 462.

²⁸IND. CODE §§ 4-15-2-1 to -43 (1982 & Supp. 1984).

²⁹IND. CODE § 4-15-2-35 (1982).

³⁰*Id.*

³¹*Id.* The court's decision renders the legislature's temporal limitation superfluous. See *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981); *Lugar v. New*, 418 N.E.2d 248 (Ind. Ct. App. 1981) (cited by the court in *Rockville* as standing for the proposition that every word in a statute should be given meaning).

³²See *supra* text accompanying notes 17-20.

³³456 N.E.2d at 462-63.

³⁴*Id.* at 461.

The *Van Ulzen* court accepted the *Rockville* court's construction of the Act as a "practical result" and explained:

[I]f the complaints were termed legally insufficient at the outset by the Commission, then that legal insufficiency is not cured simply by taking the matter to arbitration. For example, if the Commission was in error in its ruling, then the complaint will be reviewed by the trial court pursuant to the AAA, and it will remand the matter and compel the Commission to conduct a hearing. If the employees' grievances are deemed meritorious by the Commission, it will make a recommendation to the appointing authority; then, if the employees are dissatisfied with the recommendation, they may submit the complaint to arbitration. On the other hand, if, on judicial review, the trial court sustains the Commission's decision, then a pointless arbitration proceeding is avoided.³⁵

This complicated procedure, flowing from the *Rockville* and *Van Ulzen* decisions, does not appear more practical than the procedure seemingly provided by the Act, where an employee may elect the expedient of arbitration when any unsatisfactory decision is rendered by the Commission.³⁶ Under *Van Ulzen*, the aggrieved employee may be required to pursue the appellate process under the AAA from trial court to court of appeals and possibly to the Indiana Supreme Court before the complaint can finally be resolved. Moreover, the review of the Commission decision which is available in these courts is very restricted.³⁷

The *Van Ulzen* court rationalized that under its statutory interpretation, if the trial court sustains the Commission's decision, then a pointless arbitration proceeding is avoided. This rationale ignores the lengthy and cumbersome judicial appeal procedure. A more reasonable approach would allow arbitration. When the arbitrator rules in an arbitration proceeding, according to the Act, the arbitrator's findings and recommendations are binding on both parties, thus circumscribing what would then be the pointless appellate procedure.

³⁵*Id.* at 463.

³⁶*See supra* notes 21, 28 and accompanying text.

³⁷Under the AAA, IND. CODE § 4-22-1-14 (1982), in order to grant an aggrieved employee relief from an agency decision, the reviewing court must sustain the employee's allegation that the agency's action was

- (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
- (2) Contrary to constitutional right, power, privilege or immunity; or
- (3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
- (4) Without observance of procedure required by law; or
- (5) Unsupported by substantial evidence.

Id.

B. Teacher Bargaining

The Certificated Educational Employee Bargaining Act (CEEBA)³⁸ provides that if no agreement is reached between a school board and the union representing teachers as the budget submission date draws near, "the parties shall continue the status quo and the employer may issue tentative individual contracts and prepare its budget based thereon."³⁹ In *Indiana Education Employment Relations Board v. Mill Creek Classroom Teachers Association*,⁴⁰ the teachers' contract for the 1977-78 school year contained a salary schedule which listed salary levels based upon length of service and type of degree held by the teachers.⁴¹ The parties were unable to reach an agreement upon a salary schedule for the 1978-79 school year by the school board's budget submission date.⁴² The school board concluded that its teachers should be paid the same amounts they had received for the 1977-78 school year, with no increases as provided in the 1977-78 school year schedule for an additional year of service and the attainment by some teachers during the prior year of a master's degree.⁴³

An unfair labor practice charge was filed by the teachers with the Indiana Education Employment Relations Board (IEERB).⁴⁴ The IEERB ultimately sustained its Hearing Examiner's finding that the school board had maintained the status quo as required by the collective bargaining statute and, therefore, had not committed an unfair labor practice.⁴⁵ The trial court overruled the IEERB, only to be reversed by the Indiana Court of Appeals. The appellate court held that the parties' achievement of a negotiated settlement in the meantime, which included the increases previously agreed upon under the 1977-78 salary schedule, rendered the case moot.⁴⁶

The Indiana Supreme Court then reversed the court of appeals on the mootness question.⁴⁷ The court stated "that although this issue is moot with respect to the parties in the instant case, it is an issue which does recur whenever negotiation on a new contract continues after the start of a new school year and also recurs in many school districts

³⁸Act of Apr. 24, 1973, Pub. L. No. 217, § 1, 1973 Ind. Acts 1080, 1080 (codified at IND. CODE § 20-7.5-1-1 to -14 (1982)).

³⁹IND. CODE § 20-7.5-1-12(e) (1982).

⁴⁰456 N.E.2d 709 (Ind. 1983). For a discussion of the procedural aspects of this case, see Harvey, *Civil Procedure and Jurisdiction, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 91, 121 (1985).

⁴¹456 N.E.2d at 710.

⁴²*Id.* at 710-11.

⁴³*Id.* at 711.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

throughout the state.”⁴⁸ In addition, although the appellate court denied that the issue was of great public interest, the Indiana Supreme Court found the question to be “an issue of great public interest since violations of the statute governing collective bargaining between school corporations and their certified employees would necessarily undermine the bargaining relationship between school corporations and teachers and have a detrimental effect upon the overall educational environment.”⁴⁹

On the merits, the court noted that the experience-based salary increases and master degree adjustments were a part of the prior contract and held that, “In order to maintain the status quo of that contract, the school board was required to maintain the status quo both as to the salary schedule and the increments which were a part of that schedule.”⁵⁰ The court noted that not requiring school boards to pay the increases would enable the school corporations to withhold the increases as a bargaining tool.⁵¹ In support of its decision, the court cited authority from other jurisdictions in which pay increases were required to maintain the status quo.⁵²

In short, the *Mill Creek* case lays to rest the troublesome question as to the meaning of “status quo” under the CEEBA when the parties’ prior agreement contains a salary schedule with incremental increases for years of service and/or advanced academic degrees. Because salary schedules of the type considered in *Mill Creek* are common throughout the teaching profession, resolution of this issue should provide much-needed guidelines in the area. The *Mill Creek* requirement that school employers who have such salary schedules pay teachers increases in accordance with the former contract salary schedules while bargaining continues is an equitable one. This requirement should assist the parties in reaching a new agreement by eliminating the need to bargain concerning increases which the parties had already agreed to and by eliminating the use of those previous increases as a bargaining tool.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.* at 712.

⁵¹*Id.*

⁵²*Id.* The court relied on authority from Florida, New Jersey, California, Illinois, and the Sixth Circuit Court of Appeals.

X. Products Liability

JORDAN H. LEIBMAN*

A. Introduction

Judicial activity in Indiana during the survey period centered primarily on the development of two areas: First, the open and obvious danger rule after *Bemis Co. v. Rubush*,¹ and second, time limitations after the enactment of section five of the Indiana Product Liability Act.² Additionally, the issue of tort recovery for economic loss was introduced in Indiana at the federal district court level.³

These areas of judicial activity are the main focus of this Article. Legislative matters, such as the effect of Indiana's Comparative Fault Act on certain product liability issues, and the change in language of the 1983 amendment to the Indiana Product Liability Act dealing with the limiting standard of care required of a product seller under strict liability,⁴ will also be addressed in this Article.⁵

B. Open and Obvious Dangers

1. Failure to Warn.—In 1981, this writer stated that “[s]everal recent opinions handed down by the Indiana Court of Appeals are certain to substantially increase the product liability exposure of manufacturers of workplace products who sell in Indiana.”⁶ This statement referred specifically to four appellate court decisions⁷ which would have expanded

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¹427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982). *See infra* notes 6-80 and accompanying text.

²IND. CODE § 33-1-1.5-5 (1982) (amended 1983). *See infra* notes 84-194 and accompanying text. It should be noted here that during the survey period, the cases construed the unamended version of this statute. The 1983 amendments did not materially change the import of the statute for purposes of this Article. Therefore, all citations refer to the pre-1983 amendment form. The amended version of the statute appears at IND. CODE § 33-1-1.5-5 (Supp. 1984).

³*See infra* notes 195-206 and accompanying text.

⁴*See infra* notes 207-13 and accompanying text.

⁵*See infra* notes 69-80 and accompanying text (open and obvious dangers) and notes 181-82 and accompanying text (indemnity).

⁶Leibman, *Workplace Product Liability: Crumbling Indiana Defenses*, 25 RES GESTAE 312, 312 (1981) (footnote omitted).

⁷*Conder v. Hull Lift Truck Inc.*, 405 N.E.2d 538 (Ind. Ct. App. 1980), *vacated*, 435 N.E.2d 10 (Ind. 1982); *American Optical Co. v. Weidenhamer*, 404 N.E.2d 606 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983); *Shanks v. A.F.E. Indus. Inc.*, 403 N.E.2d 849 (Ind. Ct. App. 1980), *vacated*, 416 N.E.2d 833 (Ind. 1981); *Bemis Co. v. Rubush*, 401 N.E.2d 48 (Ind. Ct. App. 1980), *vacated*, 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

plaintiff recovery potential under Indiana common law. But with its decision during the current survey period in *American Optical Co. v. Weidenhamer*,⁸ the Supreme Court of Indiana has now completed the process of substantially reversing all four of these cases.⁹

In *Weidenhamer*,¹⁰ the Indiana Supreme Court rejected the appellate court's application of the principle that "where the manufacturer is obligated to give an adequate warning of danger the giving of an inadequate warning is as complete a violation of its duty as would be the failure to give any warning."¹¹ The plaintiff, Weidenhamer, was a lathe operator employed by the International Harvester Company.¹² While at work, his right eye was injured when a heavy blow shattered the right lens of the safety glasses he was wearing. Weidenhamer then sued the two manufacturers of lenses who supplied Harvester, American Optical Company and U.S. Service Safety Company.

At trial, a conflict in the testimony arose as to how the accident had occurred. Weidenhamer claimed to have no idea what actually had hit him. Yet other witnesses, reconstructing the accident scenario from circumstantial evidence, concluded that the plaintiff had failed to detach the hoist from the casting he was about to turn in his lathe. This resulted in either the hook or the bar, components of the hoist, being jerked loose from the casting when Weidenhamer began to rotate it under power. According to this version, the swinging hook or bar must have delivered the blow to the plaintiff's eye. Weidenhamer's pretrial state-

⁸457 N.E.2d 181 (Ind. 1983).

⁹*Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10 (Ind. 1982) (vacating 405 N.E.2d 538 (Ind. Ct. App. 1980)); *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981) (vacating 401 N.E.2d 48 (Ind. Ct. App. 1980)), *cert. denied*, 459 U.S. 825 (1982); *Shanks v. A.F.E. Indus. Inc.*, 416 N.E.2d 833 (Ind. 1981) (vacating 403 N.E.2d 849 (Ind. Ct. App. 1980)). The acceptance of transfer of a case by the supreme court completely vacates the lower appellate court decision, and the supreme court's failure to comment negatively on grounds relied on by the court of appeals suggests, by implication, that those principles may in the future prove persuasive in other factual settings. For example, in *Conder v. Hull Lift Truck, Inc.*, 405 N.E.2d 538 (Ind. Ct. App. 1980), *vacated*, 435 N.E.2d 10 (Ind. 1982), the court of appeals relied on the principle that a product manufacturer could be held liable for failing to warn users of, or guard users from, foreseeable product misuses—a principle not at all clear under prior Indiana law. *See* 405 N.E.2d at 546. The supreme court cautioned that many misuses were reasonably unforeseeable but if changes or modifications "could be reasonably foreseen by the manufacturer to be a safety hazard and would not be apparent to the consumer or user that there could be liability of the manufacturer." 435 N.E.2d at 17. Note that the court reiterates the open and obvious danger rule in this quotation with the phrase: "would not be apparent to the consumer or user."

¹⁰457 N.E.2d 181.

¹¹*American Optical Co. v. Weidenhamer*, 404 N.E.2d 606, 618 (Ind. Ct. App. 1980) (quoting *Spruill v. Boyle-Midway Inc.*, 308 F.2d 79, 87 (4th Cir. 1965)), *vacated*, 457 N.E.2d 181 (Ind. 1983).

¹²The facts of the case are found at 457 N.E.2d at 182-86.

ments to the doctor and his workers' compensation forms were also consistent with this account of the accident.¹³

Neither the plaintiff, the lens manufacturers, nor the employer could say for certain whose lenses Weidenhamer was wearing at the time of the accident. However, the necessity for turning this case into one of alternative liability was avoided when the court of appeals noted that Weidenhamer had testified he was wearing American Optical lenses.¹⁴ The court of appeals ruled that Weidenhamer must be bound by his testimony, and therefore granted the other manufacturer's motion for judgment on the evidence.¹⁵

The final issue in dispute was whether or not the American Optical lenses were defective, and if they were, whether or not the defect caused the plaintiff's injury. The plaintiff was unable to prove the existence of either a manufacturing or a design defect; the lens design apparently conformed to industry standards,¹⁶ and the pieces of glass that remained after the shattering were too small to test if their manufactured quality conformed to the specified design standard.¹⁷

The gist of American Optical's defense was that no safety lens could withstand unlimited force, and an ordinary user should expect no greater protection. The court even noted that industry standards were not so stringent that they required safety lenses to be strong enough to withstand unlimited forces. Heavy blows of the type that allegedly broke the plaintiff's lens were well beyond both the product's and the industry's design standards.¹⁸

The plaintiff responded, however, that he had not been made aware that this limitation existed. Had he known that the glasses could break and shatter under forces that might be encountered on the job, he would have been more careful.¹⁹ The plaintiff argued that the seller's failure

¹³*Id.* at 183-84.

¹⁴The issue of alternative liability, in the event the actual defendant in *Weidenhamer* could not have been identified, is discussed in Leibman, *Products Liability, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 1, 35 n.213 (1981).

¹⁵457 N.E.2d at 183. The supreme court stated it "would be hard pressed to agree that [Weidenhamer's] testimony was 'clear and unequivocal' that he was wearing American glasses and lenses at that time." *Id.* But because the court found for defendants on causation grounds, the identity of the manufacturer issue did not have to be reached.

¹⁶*Id.* at 186-87.

¹⁷*Id.* at 185. Even if it could be shown that the actual lens plaintiff was wearing did not measure up to the manufacturer's design standards, the resulting manufacturing defect would not be a cause in fact of the injury because the blow to the lens far exceeded the capability of even a nondefectively manufactured lens.

¹⁸*Id.* at 186. The court did not rely on this unrefuted evidence as the jury was not bound by it. *Id.*

¹⁹"I don't believe they would stand a bullet or things like this, but within the job, well, like I said there was no warning, there was nobody said watch out, you got to be careful, this was never said." *Id.* at 185 (quoting the plaintiff's testimony).

to warn of the glasses' inherent dangers²⁰ caused the lenses to be defective, and that defect was the proximate cause of his injury.²¹

The trial court denied defendant American Optical's motion for judgment on the evidence, thus allowing the failure to warn issue to go before the jury.²² The jury found for the plaintiff, and the court of appeals affirmed.²³ The primary issue on appeal from the trial court was whether or not the manufacturer had adequately warned of the dangers of shattering. There were warning messages attached to the nosepiece of each pair of glasses delivered by American Optical to the employer.²⁴ Those printed warnings, however, never reached ultimate users such as the plaintiff because they were routinely removed from the glasses by the tool crib attendant prior to distribution.²⁵ The court of appeals never addressed the issue whether American Optical had the ultimate responsibility to deliver its warning to the employee if it had delivered the warning to the employer. Instead, it held that American Optical would be liable in any event because the warning lacked sufficient intensity in both content and form to overcome the attestations of safety that also accompanied the product.²⁶

On transfer, the supreme court criticized the adequacy of the warning principle relied on by the court of appeals.²⁷ "[D]isagree[ing] with that court's entire analysis in this regard," the supreme court referred to the appellate court's finding of an inadequate warning as "debatable."²⁸ Although the case was decided on other grounds,²⁹ in dicta the court stated:

²⁰See *American Optical Co. v. Weidenhamer*, 404 N.E.2d 606, 620 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983) ("Weidenhamer's Instruction Defining a Defect"). Plaintiff brought his action under the "multiple theories of negligence, breach of implied warranty of merchantability and fitness for a particular purpose, breach of express warranty and strict liability in tort." 457 N.E.2d at 183.

²¹See *American Optical Co. v. Weidenhamer*, 404 N.E.2d 606, 621 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983) ("Weidenhamer's Instruction Concerning Strict Liability").

²²The trial court denied U.S. Safety's motion as well, but the judgment against U.S. Safety was reversed. 404 N.E.2d at 609.

²³*Id.*

²⁴Plaintiff contested this evidence because the tool crib attendant testified he had never read the nosepiece warning although he testified he had seen the nosepiece tabs many times. Inasmuch as the court of appeals assumed that the alleged warning did in fact accompany the glasses, *id.* at 617, that allegation will be considered proved for the purposes of this analysis.

²⁵457 N.E.2d at 185.

²⁶*American Optical Co. v. Weidenhamer*, 404 N.E.2d 606, 617-19 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983).

²⁷457 N.E.2d at 187.

²⁸*Id.*

²⁹The court found that the danger threatening Weidenhamer was open and obvious; it therefore held there was no duty to warn. See *infra* note 38 and accompanying text.

It [seems] to us that it requires speculation beyond lawful limits to say that had the warning been in place when the product was delivered to the consumer, it would, nevertheless, have been to no avail, because it was printed in type much smaller than the trade name and promotional matter printed upon the box which contained it.³⁰

Arguably, this gratuitous reference to warning adequacy suggests strongly that, in the future, users and consumers will be held far more responsible for reading and heeding warnings in Indiana than they would have been under the court of appeals' holding.³¹

When a product seller, or any other seller dealing with the public, sets about to create an impression in the purchaser's mind of safety, quality, authenticity, or any other positive aspect of the goods or services being marketed, that seller should not then be able to disclaim responsibility for the failure of that item to live up to the impression created. Only in cases when the disclaimer or warning is issued in sufficiently emphatic terms to overcome the effect of the original sales pitch should the product seller be allowed to disclaim responsibility.³² To convince the consumer or user on the one hand with fortissimo protestations of performance and then to disclaim liability for nonperformance in pianissimo tones is to act in bad faith. It is a practice that harkens back to the worst abuses of caveat emptor. With regard to product safety, the twentieth century rejection of caveat emptor is nearly absolute.³³ The Indiana Supreme Court's overly broad criticism of the court of appeals findings is, therefore, regrettable.

³⁰457 N.E.2d at 187.

³¹In the court of appeals, American Optical challenged Weidenhamer's instruction, claiming it was incomplete in that it failed "to inform the jury that a manufacturer can assume its warning will be read and heeded." *American Optical Co. v. Weidenhamer*, 404 N.E.2d 606, 620 (Ind. Ct. App., 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983). The court of appeals rejected this challenge on the technical ground that the objection was raised for the first time on appeal. *Id.* at 620-21. Elsewhere, however, the appellate court stated: "Where there is a reasonable basis for a jury to find the alleged warning to be inadequate or non-existent, we find a manufacturer or supplier cannot rely upon such defective warning, and its removal or destruction by a third party before reaching the ultimate consumer is of no consequence." *Id.* at 619. The supreme court's attack on this analysis would appear to shift from supplier to user much of the responsibility for alerting to the product danger.

³²A classic case illustrating this principle in a context other than product safety is *Weisz v. Parke-Bernet Galleries, Inc.*, 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1971), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (N.Y. Sup. Ct. 1974), in which the court held that even where the purchaser of a forged painting had read and understood the seller's disclaimer of responsibility for authenticity, the seller would not be permitted to rely on that disclaimer because of the image of expertise the seller had carefully erected to impress buyers.

³³With respect to consumer products, the ineffectiveness of such disclaimers is statutorily recognized in the Uniform Commercial Code. *See* U.C.C. § 2-719(3) (1976).

On the other hand, holding that an inadequate warning is equivalent to no warning at all is an overly broad interpretation of a useful principle. The idea behind such a rule is that warnings should be given in a manner so that they work. Many courts, however, use an all or nothing approach, whereby some absolute threshold of intensity for a warning statement is determined: if it is exceeded, the warning has legal validity; if it falls short, it will be treated as if it were invisible.

Certainly, the adequacy of a safety warning is fact sensitive.³⁴ For the court of appeals in *Weidenhamer* to find the warning printed on the safety glasses' nosepiece tabs was equivalent to no warning at all simply because it was in smaller type than the words SURE-GUARD SAFETY GLASS on the box, or because the trade name Super Armorplate was used in reference to the glasses, or because it failed to state that the lens might shatter, goes too far.³⁵ The adequacy of a warning should be a question for the jury under proper instructions, and is an appropriate factor for analysis under comparative fault principles as well.³⁶ But when even an "adequate" warning is highly unlikely to have averted the injury, perhaps the adequacy issue should be withheld from the jury.³⁷

For its actual holding in *Weidenhamer*, the supreme court majority finessed the adequacy of warning issue found crucial by the court of appeals and, like the latter, took no position on whether the manufacturer has a duty to warn the ultimate user, the employee, in an employment situation. Instead, the supreme court held that there was no duty at all to warn in the circumstances at bar because, as a matter of law, the danger facing the plaintiff was, or should have been, open and obvious to him.³⁸

³⁴For example, the poison label placed on a herbicide that is printed in English may be inadequate where the field workers are Hispanic, but it should be found valid where the users are Purdue graduates.

³⁵*American Optical Co. v. Weidenhamer*, 404 N.E.2d 606, 617-18 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983).

³⁶Given that there has been a warning that has failed to avert the accident, the fault may be with the party that had warned (the warning wasn't sufficiently powerful), or it may be with the party that was warned (the warning was ignored or was unreasonably misunderstood), or the fault may be with both parties (the warning by the seller could have been stronger, but it might have been effective if the product user had been more alert). In the latter case, under most comparative fault systems, the jury would be instructed to apportion liability. In Indiana, unfortunately, under the 1984 amendments to the Comparative Fault Act, apportionment of fault will not apply to strict liability actions. Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 1, 1984 Ind. Acts 1468 (codified at IND. CODE § 34-4-33-2 (Supp. 1984)).

³⁷See *infra* notes 41-47 and accompanying text.

³⁸457 N.E.2d at 182, 187-88. The court relied on its decision in *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981), *cited at*, 457 N.E.2d at 182, which it had decided after the court of appeals' decision in *American Optical Co. v. Weidenhamer*, 404 N.E.2d 606

(Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983). In *Bemis*, the supreme court reversed the court of appeals' affirmance of a jury verdict and entered judgment for the defendant, finding as a matter of law that the harm-causing instrumentality was both open and obvious. This aspect of *Bemis* is discussed in Leibman, *Products Liability, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 241, 258-60 (1983). For other discussions of *Bemis*, see Leibman & Sandy, *Can the Open and Obvious Danger Rule Coexist with Strict Tort Product Liability?: A Legal and Economic Analysis*, 20 AM. BUS. L.J. 299 (1982); Phillips, *Product Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982). In *Bemis*, the plaintiff had argued that, although the instrumentality which had struck him was open, and its functioning was obvious, the combination of events which led to the actual injury was not reasonably foreseeable and therefore the *danger*, as opposed to the instrumentality itself, was less than obvious. Rejecting this factual theory, the court's decision not to remand for a trial was a signal that Indiana would henceforth follow a broad interpretation of the open and obvious rule.

One commentator has suggested that the supreme court may have pulled back from the advanced *Bemis* position in *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277 (Ind. 1983). See Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 263-65 (1984). In *Hoffman*, the plaintiff was injured when a punch press allegedly cycled by itself while the plaintiff's hand was still between the punch and die. Again, the instrumentality (the press' ram) and its potential to smash fingers was open and obvious. The primary issue on appeal from a verdict for the defendants was whether or not an instruction which stated that the employer's failure to instruct the ultimate user that he should use available safety devices constituted intervening product misuse was an error. 448 N.E.2d at 281. The supreme court reversed the trial court and remanded, holding that there was a nondelegable duty to warn and instruct employees with respect to latent defects. Only when the user or consumer "'uses a product in contravention of a legally sufficient warning'" is the product misused. *Id.* at 283 (quoting *Perfection Paint v. Konduris*, 147 Ind. App. 106, 119, 258 N.E.2d 681, 689 (1970)) (emphasis added by the *Hoffman* court). The appellant manufacturer responded, however, that even if the instruction were in error, it was harmless because no warnings or instructions are necessary when the danger is open and obvious. *Id.* at 284-85. The court distinguished the everyday dangers posed by punch press rams which descend when the operator or some human agency activates the machine, from the extraordinary event of the machine activating itself because of "some internal malfunction or defect in the operating mechanisms of the press." *Id.* at 285. In the latter case, the danger is neither open nor obvious.

It might be argued, however, that if the point in the press where punch and die come together is recognized as a source of potential harm, the user should be on guard against the extraordinary as well as the ordinary event. If wearing pull-back cables will protect against the latter case, it will protect as well against the former. The answer to this argument is that the open and obvious danger rule is often looked upon as assumption of risk as a matter of law. See *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 384, 348 N.E.2d 571, 576, 384 N.Y.S.2d 115, 120 (1976); Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 541 (1974). Product users' knowledge, understanding, appreciation, and voluntariness is imputed to them when the risks are open and obvious. The user will be held to have knowledge of patent dangers he should have had even though, subjectively, he may be ignorant of them. But if the information is truly *unknowable*, courts will not then impute it to the user. Although the test for knowledge of danger under the rule is an objective one, even objective analysis would require the "reasonable user" to have knowledge and appreciation of the danger. If the actual user eschews safety devices either willfully or through ignorance, he can only be held contributorily responsible for awareness of the sorts of harm that a reasonable and prudent user might anticipate. A punch press operator, therefore, would not be expected

Despite the serious objection there might be to removing the obviousness of danger issue from the jury, the final determination of no liability in *Weidenhamer* was probably justified. The small typeface, together with the incomplete content of the message, should not have been ruled, as a matter of law, to have reduced the value of the warning to zero given the intervention of the tool crib attendant.³⁹ Even the concurring opinion followed the reasoning that if the warning had been delivered to the ultimate user, it may have proven adequate under the circumstances.⁴⁰

Upon the defendant's motion for judgment on the evidence, *Weidenhamer*, in effect, argued that had he been warned that his lens might break and shatter under the enormous impact to which it was in fact subjected, he would have behaved differently by acting more carefully.⁴¹ But for the lack of warning, he argued, the accident would not have occurred. Given the undisputed facts surrounding the accident, however, the claim that an adequate warning would have, or even might have, averted this injury was simply insufficient to establish that the inadequacy of the warning was a cause in fact of the harm.

Finally, it remains to be seen what effect the intervention of the tool crib attendant had on the adequacy of warning issue. In *Burton v. L.O. Smith Foundry Products Co.*,⁴² the Seventh Circuit Court of Appeals, applying Indiana law, ruled that the duty of the workplace product manufacturer to warn the ultimate user depends on the manufacturer's control of events in the workplace.⁴³ Likewise, the Indiana Supreme Court, in *Hoffman v. E.W. Bliss Co.*,⁴⁴ held that where there is limited or no control over the workplace, it is sufficient to warn the

to have knowledge that his machine might activate itself. The *Hoffman* case does not appear to be much of a retreat from the *Bemis* holding on this count.

Where the *Bemis* case went much too far was in its taking from the jury the determination of what sorts of harm the reasonable user should be expected to anticipate. The scope of extraordinary events which a reasonable user does not expect to happen goes beyond the merely freaky and those caused by malfunctioning devices. The reasonable machine user may be on constant guard against moving parts; but like the plaintiff in *Bemis*, his or her concentration may be broken by unexpected and frightening breaks in the work rhythm. Under those circumstances, the plaintiff should be entitled to a jury trial on the issue of obviousness. See *Liebman & Sandy, supra*, at 306-06 (discussing this argument in *Bemis*).

³⁹Justice DeBruler concluded that issuing the lenses with no warning made them defective, but if there had been no detachment of the warning by the tool crib attendant, "[there would have been] insufficient evidence that the glasses were defective because of inadequate warnings by the manufacturer." 457 N.E.2d at 189 (DeBruler, J., concurring).

⁴⁰*Id.* at 188-89 (DeBruler, J., concurring). See *supra* notes 35-42 and accompanying text.

⁴¹See *supra* note 19 and accompanying text.

⁴²529 F.2d 108 (7th Cir. 1976).

⁴³*Id.* at 111.

⁴⁴448 N.E.2d 277 (Ind. 1983).

employer of product dangers.⁴⁵ The *Hoffman* court stated that “the manufacturer has a duty to warn of potential dangers associated with the use of the product that is otherwise free from latent design or manufacturing defects only where he has some control over the manner in which the employer incorporates the product into his operation.”⁴⁶ Clearly, the manufacturer must reach out to the user with his warning message if at all possible, but he will be absolved of responsibility if no control over the workplace is available to him. Thus, it may have been necessary, under Indiana law, to impute to Weidenhamer the receiving of the warning as originally printed on the nosepiece tab, yet in *Weidenhamer* neither appellate court sought to resolve the delivery of warning question.

Under a cause in fact analysis, however, this could be an issue. If it were found that American Optical had done what it reasonably could to deliver its warning, the plaintiff would have to show that, if he had received an “adequate” warning, he would have conducted himself differently than he would have had he merely received the nosepiece tab with its purportedly inadequate warning. Even if the warning then had been determined inadequate, so that American Optical would not have received the benefit of a “read and heed” presumption that goes with an adequate warning,⁴⁷ the plaintiff would still be expected to present some credible cause in fact evidence to escape a directed verdict. The plaintiff’s naked assertion that his conduct as a lathe operator would

⁴⁵*Id.* at 281. In the *Hoffman* case, the court ruled that the following two paragraphs, from separate instructions, when taken together, properly stated the law:

“If you find that the plaintiff was either inadequately instructed and/or failed to use available safety devices which was [sic] the proximate cause of his injury, then I instruct you that this would constitute a misuse of the equipment and be a complete defense to the allegations against E.W. Bliss Company.”

. . . .

“You are instructed that where warnings or instructions are required to make a product nondefective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risk and inherent limits of the product. The duty to provide a nondefective product is nondelegable.”

Id. at 281-82.

⁴⁶*Id.* at 283 (citation omitted).

⁴⁷See RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965) (“Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.”). In *Nissen Trampoline Co. v. Terre Haute First Nat’l Bank*, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev’d on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976), the court prefaced the word warning with the modifier “adequate,” 332 N.E.2d at 826. If a warning is given but found to be inadequate, the seller does not obtain the benefit of the presumption. But even without the presumption, the plaintiff must produce some credible evidence that, but for the absence of an adequate warning, the injury would not have occurred.

have been positively affected by a lens manufacturer's warning of shatterability is in this writer's view insufficient evidence to establish the prima facie element of cause in fact.

2. *Failure to Guard*.—If the open and obvious danger rule retains any general validity, it is in the area of duty to warn. Warning of a patent danger is not only redundant, it can prove counterproductive.⁴⁸ However, relieving a product seller from a duty to *physically guard* users from open hazards when feasible to do so is an anachranistic interpretation of the rule rejected by most jurisdictions, which have recently considered the question.⁴⁹ Such a broad holding actively discourages the deployment of essential safety devices.

In *Bryant-Poff, Inc. v. Hahn*,⁵⁰ the plaintiff was severely injured when his arm was caught in an elevator leg manufactured by the defendant. The leg was activated by a person on the ground while the eighteen-year-old plaintiff was painting the mechanism from a platform ninety feet above the ground. When first delivered, the leg had a disconnect by which one ascending the machine could deactivate the mechanism before working on it. At the time of the accident the disconnect may have been inoperative; but in any event, the plaintiff had not been made aware of its existence, nor had he been warned of the danger of placing his hand in a position where it could be trapped if the mechanism was started up from below. There was also conflicting

⁴⁸See A. WEINSTEIN, A. TWERSKI, H. PIEHLER & W. DONAHER, *PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT* 64-68 (1978). "The overuse of warnings invites consumer disregard and ultimate contempt for the warning process." *Id.* at 68.

⁴⁹See *Franchetti v. Intercole Automation, Inc.*, 523 F. Supp. 454 (Del. 1981). In this diversity case the district court was required to predict how the Delaware Supreme Court would rule on the patent danger rule. The court cited Darling, *The Patent Danger Rule: An Analysis and a Survey of Its Vitality*, 29 MERCER L. REV. 583 (1978), and noted "that while the rule appears viable in some seventeen jurisdictions, it has been rejected in eighteen and has been neither accepted nor rejected in sixteen." 529 F. Supp. at 536-37. The court noted the heavy criticism the rule has sustained in recent years and concluded "some courts have taken a different view, but to the extent that there is a trend in recent opinion, it would seem to be away from the rule. See *Darling* at 606-09 (which notes, inter alia, that virtually all decisions repudiating the rule have been made since 1970)." 529 F. Supp. at 537. The court predicted Delaware would follow this trend. *Id.* at 538.

See also *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979).

The modern trend in the nation is to abandon the strict patent danger doctrine as an exception to liability and to find that the obviousness of the defect is only a factor to be considered as a mitigating defense in determining whether a defect is unreasonably dangerous and whether plaintiff used that degree of reasonable care required by the circumstances.

Id. at 1169. But see *Pressley v. Sears-Roebuck & Co.*, PROD. LIAB. REP. (CCH) ¶ 10,164 (N.D. Ga. Aug. 13, 1984) (predicting Georgia would continue to follow a broad interpretation of the open and obvious danger rule).

⁵⁰454 N.E.2d 1223 (Ind. Ct. App. 1982), *transfer denied*, 453 N.E.2d 1171 (Ind. 1983), *cert. denied*, 104 S. Ct. 1433 (1984).

testimony as to whether or not the manufacturer had provided the purchaser with instructions concerning the switches.

The plaintiff brought suit under negligence and strict liability theories,⁵¹ alleging that Bryant-Poff had failed to warn of the danger⁵² and had failed to provide a barrier guard which was called for by industry standards as early as 1957.⁵³ The jury found for the plaintiff but the court of appeals reversed,⁵⁴ citing *Bemis Co. v. Rubush*.⁵⁵ The court of appeals read *Bemis* to hold that even if the lack of a guard makes the product "unreasonably dangerous," no liability can attach if the injury-causing defect is open and obvious to the injured party.⁵⁶ Yet this interpretation goes further than the defendant's argument in *Bemis*. There, the defendant sought to reconcile strict liability theory with the open and obvious danger rule by asserting that an obvious danger is not, by definition, unreasonable.⁵⁷ At least the court of appeals eschewed that bit of circular reasoning.

The Indiana Supreme Court denied transfer of *Hahn*, to which Justice Hunter wrote a strong dissent in which Justice DeBruler concurred.⁵⁸ Justice Hunter noted the dissonance in finding "something unreasonably dangerous but also open and obvious."⁵⁹ Although preferring the treatment of obviousness of danger as but one factor in determining whether the danger is beyond the contemplation of the ordinary user, he argued that the case at bar was incorrectly decided even under the *Bemis* holding.⁶⁰ Relying on *Hoffman v. E.W. Bliss Co.*,⁶¹ he argued that the obviousness of the danger should be a jury question under which the jury could find that the elevator leg contained a latent defect.⁶² For the scintilla of evidence necessary for the plaintiff

⁵¹454 N.E.2d at 1224.

⁵²*Bryant-Poff, Inc. v. Hahn*, 453 N.E.2d 1171, 1174 (Ind. 1983) (Hunter, J., dissenting) (discussing the failure to warn issue), *cert. denied*, 104 S. Ct. 1433 (1984).

⁵³454 N.E.2d at 1224.

⁵⁴*Id.* at 1224-25.

⁵⁵427 N.E.2d 1058 (Ind. 1981).

⁵⁶454 N.E.2d at 1225.

⁵⁷*Bryant-Poff, Inc. v. Hahn*, 453 N.E.2d 1171, 1172 (Ind. 1983) (Hunter, J., dissenting), *cert. denied*, 104 S. Ct. 1433 (1984). "Under the *Bemis* rationale, the Court of Appeals' decision is inherently inconsistent because a product cannot be unreasonably dangerous if it had an open and obvious danger." 453 N.E.2d at 1172.

⁵⁸*Bryant-Poff, Inc. v. Hahn*, 453 N.E.2d 1171, 1172 (Ind. 1983) (Hunter, J., dissenting), *cert. denied*, 104 S. Ct. 1433 (1984). Interestingly enough, this was the same split as in *Bemis Co. v. Rubush*, 427 N.E.2d 1058.

⁵⁹*Bryant-Poff, Inc. v. Hahn*, 453 N.E.2d 1171, 1171-72 (Ind. 1983) (Hunter, J., dissenting), *cert. denied*, 104 S. Ct. 1433 (1984).

⁶⁰See *supra* note 57.

⁶¹448 N.E.2d 277 (Ind. 1983).

⁶²*Bryant-Poff, Inc. v. Hahn*, 453 N.E.2d 1171, 1172 (Ind. 1983) (Hunter, J., dissenting) (citing *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277, 285 (Ind. 1983)), *cert. denied*, 104 S. Ct. 1433 (1984).

to escape judgment on the evidence, Justice Hunter argued that a latent failure to warn defect could be found. He argued, ingeniously, that if there had been a barrier guard, a novice user such as Hahn would have been alerted to the presence of danger; therefore, the absence of the guard was a latent failure to warn defect.⁶³ Similarly, the fact that the power to the elevator leg was not disconnected might be found less than obvious inasmuch as a user might expect some sign or light that the power was connected.⁶⁴ Justice Hunter also observed that taking the obviousness issue from the jury encourages the manufacture and marketing of products naked of safety devices and guards because the "manufacturer may avoid liability by purposefully leaving off safety devices in order to make a danger more obvious."⁶⁵

As a final argument, Justice Hunter asserted that a manufacturer must warn the ultimate user of "latent defects and/or possible dangers associated with the product" if the manufacturer has some control of the workplace environment.⁶⁶ He relied on confusing language from *Hoffman*,⁶⁷ which in context surely means that products may be free of latent design and manufacturing defects, yet may still contain latent dangers. To warn of these latent dangers is a nondelegable duty; thus, failure to do so creates a latent warning defect in the product. Yet *Hoffman* cannot be read to require a manufacturer to warn of patent dangers.

Although Justice Hunter may have stretched the *Hoffman* holding further than that court intended, he is on solid ground when he argues that the underlying policy of strict liability "is that the manufacturer has the primary responsibility for making a product reasonably safe for its intended and foreseeable use."⁶⁸ It is difficult to see how that responsibility can be discharged by introducing products into the stream of commerce which possess dangers, patent or not, which could be removed or reduced at costs commensurate with or less than the cost of harm threatened to the safety of users and bystanders.

3. *The Indiana Comparative Fault Act*.⁶⁹—It was suggested in last year's products liability survey article that the open and obvious danger rule should be subsumed into the common law defenses of contributory

⁶³453 N.E.2d at 1174.

⁶⁴*Id.*

⁶⁵*Id.* (citations omitted).

⁶⁶*Id.*

⁶⁷"Furthermore, a 'manufacturer has a duty to warn of potential dangers associated with the use of a [sic] product that is otherwise free from latent design or manufacturing defects' if he has some control over the way an employer incorporates the product into his operation." *Id.* (quoting *Hoffman*, 448 N.E.2d at 283).

⁶⁸*Id.* at 1174 (citations omitted).

⁶⁹IND. CODE §§ 34-4-33-1 to -13 (Supp. 1984).

negligence and assumption of risk.⁷⁰ Conceptually, however, the broad application of the rule calls for proof of a latent defect to be part of the plaintiff's case in chief. In other words, under the rule, there is *no duty* on the part of the seller to warn or guard a user, consumer, or bystander of an obvious danger. Once it is determined that the sole proximate cause of the plaintiff's injury was a patent defect, the defendant is entitled to judgment on the evidence.

Dubious policy considerations lend support to this harsh and anachronistic rule. First, in the workplace context, injured employees have access to the worker compensation system; a tort recovery against third parties which is available only to workers injured by products provides those workers with an unjustified and unnecessary windfall. Second, employees need strong incentives to take care for their own safety in the workplace when they are given the wherewithal to do so. Third, product manufacturers should not be exposed to unlimited liability; to do so puts unreasonable constraints on commerce and raises the prices of products. Fourth, litigation in the burgeoning product liability area needs more constraint and less liberalization. Fifth, the modern theory of strict liability strips sellers of their contributory negligence defense; retaining the open and obvious danger rule redresses the equitable imbalance thus caused.

A survey article does not provide the space for engaging these notions, but it is this writer's conviction that the split decision of the Indiana Supreme Court in *Bemis Co. v. Rubush*⁷¹ was dictated primarily by these policy considerations rather than serious doctrinal analysis. Under the Indiana Comparative Fault Act, however, the effects of liberalization feared by the *Bemis* court can now be compromised if Indiana courts are willing to do so. The act of a plaintiff encountering an open and obvious danger can be treated as fault to be compared with a defendant's "fault" in permitting a reducible, albeit obvious, danger to be launched into the stream of commerce. This writer predicts that such will be the result because the present rule which holds that an open and obvious danger cannot under any circumstances be considered actionable is simply indefensible.

In applying the new statute to open and obvious dangers, there remains one problem. The legislature amended the Act in 1984 to eliminate the application of comparative fault to strict liability cases,⁷² and most product cases are decided today under that theory. Thus, at first glance

⁷⁰See Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 269 (1984).

⁷¹427 N.E.2d 1058 (Ind. 1981) (3-2 decision), *cert. denied*, 459 U.S. 825 (1982).

⁷²Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 1, 1984 Ind. Acts 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

it would appear that plaintiffs seeking to compare their fault in encountering open and obvious dangers with that of defendants will be severely constrained by the amendment, as they will have to rely on a negligence theory.

The open and obvious danger rule, however, generally arises in product cases in the context of an alleged design defect,⁷³ where the manufacturer incorporates into its design some hazardous product characteristic of which the ordinary user should be aware. In a case of defective design under strict liability, the plaintiff is required to show that the design characteristic is more dangerous than an ordinary user would contemplate.⁷⁴ In Indiana, this standard is very similar to that which is required in a negligent design case. Additionally in a negligent design case, the plaintiff has to prove that a reasonable manufacturer would have removed, reduced, or adequately warned of the unreasonable danger.⁷⁵

In a strict tort case, the focus is on the condition of the product. Yet under the theory of strict liability, manufacturers are generally not held culpable if the product dangers were truly unknowable or were beyond the technological state of the art at the time they were first delivered to the ultimate user. Similarly, under a negligence theory, a manufacturer's knowledge of harmful propensities is held to be that of an expert.⁷⁶ As a result, the practical legal standards under both theories

⁷³Conceptually, there is no reason why obvious dangers cannot occur as a result of manufacturing flaws. However, flaw cases are less frequently litigated because the quality and integrity of an entire product line is not at issue, as occurs when the product design is alleged to be defective.

⁷⁴See *Bryant-Poff, Inc. v. Hahn*, 453 N.E.2d 1171 (Ind. 1983) (Hunter, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965), first adopted in Indiana courts in *Cornette v. Searjeant Metal Prod.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970)), *cert. denied*, 104 S. Ct. 1433 (1984). Although this is the general and Indiana standard for finding a defect under strict liability, the same standard would apply to defining design defect under negligence theory.

⁷⁵This additional element, required to prove breach of duty under negligence, is probably identical to what is required in many jurisdictions to prove that a product design is unreasonably dangerous under strict liability. Under both theories, the design is subjected to a risk utility analysis in which the probability and severity of harm is balanced against the cost of removing the risk, or else warning of it. In design cases, the test for defectiveness is generally Learned Hand's "algebra of negligence," *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), or its expanded version, Professor Wade's factor analysis. See Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965). See also *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (1973) (stating that there is an essential similarity between negligence and strict liability in design cases).

⁷⁶See Leibman, *The Manufacturer's Responsibility to Warn Product Users of Unknowable Dangers*, 21 AM BUS L.J. 403 (1984) (discussing the state of the art defense under negligence and strict liability theories). This defense has been statutorily adopted in Indiana for strict liability cases. IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1984). See also

tend to be quite similar in a design case, if not congruent.⁷⁷

Another reason for pleading negligent design, rather than strict liability in tort, is the recent amendment to the Indiana Product Liability Act⁷⁸ which removes negligence from that Act's coverage, with the exception that the ten year repose provision will continue to constrain negligence actions accruing after September 1, 1983.⁷⁹ Furthermore, in some cases, Indiana common law negligence theory might be more favorable to the plaintiff than is the substantive law under the statute.⁸⁰ In summary, either the Indiana Supreme Court or the Indiana General Assembly, if it chooses to act, could classify unreasonable patent dangers introduced by a seller as a species of fault which can be compared with the user's fault in having allowed the obvious hazard to cause the injury.

C. Statutes of Limitation and Statutes of Repose

A true statute of limitations begins running when the plaintiff's cause of action accrues. Before there is accrual, however, some actionable harm must have occurred. In contrast, a statute of repose begins running at some date unrelated to the occurrence of harm. Generally, the limitation period under a repose statute begins when the defendant performs the act which may or may not ultimately result in harm.

1. *Wrongful Death Claim.*—In *Pitts v. Unarco Industries, Inc.*,⁸¹ a diversity wrongful death case, the plaintiff argued that the repose

2 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d 153-54 (2d ed. 1974).

⁷⁷See *Feldman v. Lederle Laboratories*, PROD. LIAB. REP. (CCH) ¶ 10,179, at 26, 535 (N.J. Jul. 30, 1984).

The question in strict-liability-design-defect and warning cases is whether, assuming that the manufacturer knew of the defect in the product, he acted in a reasonably prudent manner in marketing the product or in providing the warning given. Thus, once the defendant's knowledge of the defect is imputed, strict liability analysis becomes almost identical to negligence analysis in its focus on the reasonableness of the defendant's conduct. In *Cepeda*, . . . we quoted approvingly Prosser's treatise on torts: "Since proper design is a matter of reasonable fitness, the strict liability adds little or nothing to negligence on the part of the manufacturer * * *."

Id. (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, at 659 n.72 (4th ed. 1971)).

⁷⁸Act of Apr. 21, 1983, Pub. L. No. 297-1983, 1983 Ind. Acts 1814 (codified at IND. CODE § 33-1-1.5-1 to -5 (Supp. 1984)).

⁷⁹See IND. CODE § 33-1-1.5-5 (Supp. 1984).

⁸⁰For example, neither section 3 of the original Product Liability Act nor section 3 as amended provides for bystander recovery in a products liability action. Presumably, a bystander injured by a foreseeable latent product design defect should be able to recover under Indiana common law negligence. See Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 242 (1979) (discussing the bystander question raised by the original statute).

⁸¹712 F.2d 276 (7th Cir. 1983), cert. denied, 104 S. Ct. 509 (1983).

provision of the Indiana Product Liability Act⁸² was unconstitutional because it deprived her of a property interest without due process of law in violation of the fourteenth amendment. The plaintiff's decedent was an insulation mechanic who died from lung disease allegedly caused by asbestos products manufactured by the sixteen defendants. Six defendants successfully took the position that there could be no liability as to them because they had delivered their products ten years prior to the filing of the wrongful death suit. On appeal, the plaintiff argued that the enactment of the ten year repose provision prior to the filing of suit effectively barred a claim she would have had but for the enactment.⁸³ Denial of her claim therefore constituted a taking of property.

The court disagreed, pointing out that there is no property right in an unaccrued claim.⁸⁴ Despite the fact that a wrongful act may have been committed prior to the decedent's death that might have been actionable by him, the plaintiff's wrongful death claim could not have accrued prior to the death itself. Before the wrongful death action in *Pitts* finally did accrue however, the Indiana General Assembly passed a statute significantly limiting the plaintiff's unvested "rights." This, the court stated, the Indiana legislature had a perfect right to do.⁸⁵ The court also noted that statutes of limitation which bar claims before they can accrue had been ruled constitutional in Indiana and elsewhere with respect to due process challenges.⁸⁶

Similarly, the provision was held not to be in violation of equal protection guarantees merely because it classified plaintiffs into two classes: those killed by ten year old or older products and those killed

⁸²IND. CODE § 33-1-1.5-5 (Supp. 1984) provides:

This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action in which the theory of liability is negligence or strict liability in tort must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

⁸³712 F.2d at 279.

⁸⁴*Id.*

⁸⁵"The Indiana legislature could, if it wanted, do away entirely with wrongful death actions beginning tomorrow even though there are probably some persons with living spouses who hope that the wrongful death statute . . . remains on the books in case their spouses are ever killed because of someone else's negligence." *Id.* (citation omitted).

⁸⁶*Id.* at 279-80, (citing *Bunker v. National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 103 S. Ct. 1761 (1983). *Bunker* involved a constitutional challenge to the three year last exposure rule of the Indiana Occupational Diseases Act. See Leibman, *Workers' Compensation, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 427, 428-32 (1984); Leibman & Dworkin, *A Failure of Workers' Compensation and Tort: Bunker v. National Gypsum Co.*, 18 VAL. U.L. REV. 941 (1984).

by newer products.⁸⁷ The court relied on an occupational disease case, *Bunker v. National Gypsum Co.*,⁸⁸ in which a three year from last exposure statute of limitations was upheld. Although the classifications created by the statute in *Bunker* were somewhat different than in *Pitts*, the alleged injustice in both cases was caused by the delayed manifestation of asbestos-related diseases. In *Bunker*, the Indiana Supreme Court found sufficient rational basis in the repose interest for the legislature's statutory scheme to withstand equal protection challenges as well as those alleging violation of due process guarantees.⁸⁹

The plaintiff in *Pitts* also sought to toll the repose provision by arguing that the defendants had fraudulently concealed the dangers of asbestos.⁹⁰ Because of procedural infirmities, the court was not required to rule on this issue, but in dicta the court stated that "[p]assive silence . . . is insufficient to trigger the fraudulent concealment doctrine, absent allegations that the defendants were in a continuing fiduciary relationship with the plaintiff."⁹¹

With respect to the new product liability repose statutes, the traditional fraudulent concealment rule is in need of judicial or legislative modification. The justification for putting the product seller's exposure to liability in repose a statutory number of years after the product is first delivered to its user is that extended use of a product, without its causing harm, should in time create an irrebuttable presumption that the product is reasonably safe. Also, litigation more than ten years after delivery presumably puts an unfair defensive burden on the seller who is then in a poor position to gather evidence.⁹² Repose statutes, however, unlike ordinary statutes of limitation, are not justified by the added rationale that they encourage injured parties to act promptly. This is because the victims may not yet have been injured before the statute has run, or may not have discovered the injury in time to bring suit.

For sellers to be granted the protection of repose statutes, it seems fair to require them to affirmatively disclose any latent product dangers of which they are aware or which they could readily ascertain. This is especially true in cases of delayed manifestation injuries, where the undiscovered harm does in fact occur within the statutory period.⁹³ Sellers should not be permitted to profit from such unconscionable silence, and jurisdictions which continue to recognize the validity of repose protection

⁸⁷712 F.2d at 280-81.

⁸⁸441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 103 S. Ct. 1761 (1983).

⁸⁹441 N.E.2d at 14.

⁹⁰712 F.2d at 278-79.

⁹¹*Id.* at 279 (citations omitted).

⁹²*See id.* at 279-80.

⁹³It may be useful to distinguish the situation where the injury takes place after the repose period has passed from the situation where harm has occurred but has not yet manifested itself. An example of the former instance is a defectively designed punch press

in delayed manifestation cases should recognize this much of a fiduciary relationship existing between sellers and users.

Tolling a repose statute or an unreasonably short statute of limitations because of a seller's failure to affirmatively disclose knowable latent dangers need not be equivalent to a finding that the seller is liable under the tort of deceit. The tolling of the statute of repose would merely permit the plaintiff to argue the merits of the underlying product liability theory rather than cutting off the claim at the threshold of the case.

2. *Personal Injury and Warranty Statutes of Limitations.*—The statute of limitations section of the Indiana Product Liability Act⁹⁴ was also challenged in *Braswell v. Flintkote Mines, Ltd.*,⁹⁵ but this time the court pointed out that Indiana's general tort statute of limitations for personal injury⁹⁶ was at issue as well.⁹⁷ In *Braswell*, the plaintiffs were asbestos workers who had been employed at the World Bestos⁹⁸ plant in New Castle, Indiana. The earliest initial exposure to asbestos of any of these plaintiffs was in 1943; the latest initial exposure was in 1964.⁹⁹

Neither *Braswell* nor the other six plaintiffs filed their lawsuits within two years of their last exposure to the asbestos manufactured by the defendants. Therefore, the trial court granted the defendant's motion for summary judgment on the ground that the plaintiffs were time barred by Indiana statutes of limitation.¹⁰⁰

Section 33-1-1.5-5 of the Product Liability Act contains a two year statute of limitations and a ten year repose provision;¹⁰¹ either provision would have sufficed to bar these plaintiffs' claims accruing after June 1, 1978.¹⁰² Yet the trial court ruled, and the court of appeals affirmed, that under Indiana law, personal injury claims accrue no later than the plaintiff's last exposure to the injurious hazard which caused the injury.¹⁰³ Because five of these last injurious exposures occurred prior to June 1,

which double trips for the first time ten years after initial delivery to the user. An example of the latter is a case of asbestosis which begins to manifest itself in symptoms ten years after delivery even though irreversible and actionable harm to the lungs took place years earlier. The argument for permitting recovery in the latter instance is certainly more compelling than in the former.

⁹⁴IND. CODE § 33-1-1.5-5 (Supp. 1984) (quoted *supra* note 82).

⁹⁵723 F.2d 527 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2690 (1984).

⁹⁶IND. CODE § 34-1-2-2 (1976) (amended 1981) (current version at IND. CODE § 34-1-2-2 (1982)).

⁹⁷723 F.2d at 529.

⁹⁸World Bestos is a division of Firestone Tire and Rubber Co. *See id.* at 528.

⁹⁹*Id.* at 529.

¹⁰⁰*Id.*

¹⁰¹*See supra* note 93.

¹⁰²IND. CODE § 33-1-1.5-8 (1982) The effective date of the statute was June 1, 1978, and the statute does not "apply to a cause of action that accrues before June 1, 1978." *Id.*

¹⁰³723 F.2d at 529.

1978, the Product Liability Act did not apply to them, but the general Indiana tort statute of limitations did apply.¹⁰⁴ With either limitation statute, however, the issue was the same: Does a tort statute of limitations meet due process requirements if it cuts off claims before the plaintiffs can discover the nature of their injury or even that they are in fact injured? Relying on *Pitts v. Unarco Industries, Inc.*¹⁰⁵ and *Scalf v. Berkel, Inc.*,¹⁰⁶ the court held that the answer clearly was yes.

However, the statutes of limitation examined in *Braswell* and the repose provision which was at issue in *Pitts* and *Scalf* are distinguishable. A repose statute does not require the accrual of a plaintiff's cause of action in order to bar that action. The clock starts running from the moment of the defendant's essential act; in Indiana, that moment is the initial delivery of the product.¹⁰⁷ A true statute of limitations, on the other hand, requires some actionable harm to have occurred. The question is how early can it be held that the plaintiff has suffered actionable harm.

The plaintiff in *Braswell* recognized this difference, and complained that the lower court had improperly found that his cause of action had accrued upon his last exposure to asbestos. The plaintiff's argument was that a cause of action has not accrued until the injury is ascertainable.¹⁰⁸ The Seventh Circuit Court of Appeals found the plaintiff's version of the proper date of accrual under Indiana law was in contradiction to the stand taken by the Indiana Supreme Court in *Shideler v. Dwyer*.¹⁰⁹

In *Shideler*, the Indiana Supreme Court cited and quoted from a 1936 New York "dust" case with approval in order to rule that, because undiscovered or even undiscoverable harm is theoretically actionable, the commencement of that harm starts the limitation statute running.¹¹⁰ Actually, the holding in the New York case probably went further than the *Shideler* holding,¹¹¹ for that case, *Schmidt v. Merchants Dispatch Transportation Co.*,¹¹² stands for the "wrongful act" or "impact" rule, which would start the statute running upon the defendant's setting in motion the forces that ultimately cause the harm. *Shideler*, on the other

¹⁰⁴*Id.*

¹⁰⁵712 F.2d 276 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 509 (1983). See *supra* notes 81-93 and accompanying text.

¹⁰⁶448 N.E.2d 1201 (Ind. Ct. App. 1983). See Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 271 (1984)

¹⁰⁷See IND. CODE § 33-1-1.5-5 (Supp. 1984) (quoted *supra* note 82).

¹⁰⁸723 F.2d at 531.

¹⁰⁹417 N.E.2d 281 (Ind. 1981), *quoted in*, *Braswell*, 723 F.2d at 532.

¹¹⁰417 N.E.2d at 289 (quoting *Schmidt v. Merchants Dispatch Transp. Co.*, 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936).

¹¹¹*Schmidt v. Merchants Dispatch Transp. Co.*, 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936).

¹¹²*Id.*

hand, held that a cause of action accrues when liability for the wrong attaches.

The reasoning behind the impact rule is clearly flawed because the unleashing of deleterious forces might not ever result in actionable harm. For example, the majority of workers exposed to asbestos never suffer health impairments. As Judge Swygert pointed out in his strong dissent in *Braswell*,¹¹³ had the plaintiff "brought an action against manufacturers of asbestos before any manifestation of the disease . . . [he] would [have been] 'laughed out of court.'"¹¹⁴ Because *Shideler* did not unequivocally adopt the impact rule,¹¹⁵ Judge Swygert would have certified the time of accrual question to the Indiana Supreme Court for clarification.¹¹⁶

Under the "impact" rule, an initial exposure, which could consist of a single inhalation of deleterious dust, would be sufficient for the accrual of a personal injury cause of action. Where exposure is repeated, presumably each new exposure would lead to the accrual of a new action and, thus, the last exposure would mark the starting point for the running of the statute of limitations. Therefore, the majority in *Braswell* opined, the last exposure rule was indeed the Indiana rule.¹¹⁷

Judge Swygert argued that mere exposure without more is not actionable in Indiana. Personal injury claims accrue in Indiana when the beginning of the disease occurs. "Although it may be difficult to determine when a progressive disease such as asbestosis first occurs, the date of last exposure is clearly irrelevant to that determination. . . . Plaintiffs' asbestosis could have begun to develop any time before or after that date."¹¹⁸ What would be required would be a fact finding determination based on qualified medical evidence.¹¹⁹

The essential difference between the majority's approach and the dissent's approach is that the majority would fix the time of accrual at the plaintiff's last exposure to the hazard, while the dissent would leave the time of accrual to the jury.¹²⁰ Yet regardless of whether the cause

¹¹³723 F.2d at 533 (Swygert, J., dissenting).

¹¹⁴*Id.* (quoting *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 316, 323, 164 Cal. Rptr. 591, 595 (1980)).

¹¹⁵Even the majority recognized that no Indiana courts had explicitly adopted the wrongful act or impact rule. 723 F.2d at 532.

¹¹⁶*Id.* at 533-34.

¹¹⁷*Id.* at 533.

¹¹⁸*Id.* at 536 (citation omitted).

¹¹⁹"Thus even if *Shideler* is deemed to govern this case, the case must be remanded to the district court for determinations of the dates on which plaintiffs' injuries occurred." *Id.* (citation omitted).

¹²⁰The practical effect of the latter approach would be to run the statute from the time a medical abnormality is first evidenced inasmuch as no expert witness is likely to fix a specific date for the onset of disease prior to evidence of some abnormality. It could be expected in most cases that the abnormality would be evidenced by symptoms

of action is found to accrue upon impact or some other point prior to the manifestation of symptoms, the court found no constitutional infirmities under either due process¹²¹ or equal protection principles.¹²²

The accrual of a cause of action under the Indiana personal injury statute of limitations was also considered at the federal district court level in *Tolen v. A.H. Robins Co.*¹²³ The plaintiff claimed injury from the use of an intrauterine device known as the Dalkon Shield which was manufactured by Robins. Although the device was inserted on February 15, 1972, the plaintiff delivered a child on November 23, 1972. Following the birth, a bilateral tubal ligation was performed during which the Dalkon Shield could not be located. During the next three years, the plaintiff suffered a number of serious health problems which she later attributed to the device. The shield was ultimately found in her lower left stomach cavity. In late 1979, the plaintiff learned of problems with Dalkon Shields experienced elsewhere and filed suit on November 13, 1981 against Robins for negligence, strict liability, breach of warranty, and fraud.¹²⁴ The defendant moved for summary judgment¹²⁵ on the grounds that the tort actions were time barred two years after plaintiff's injury,¹²⁶ and the warranty actions were barred four years after sale of the product.¹²⁷ The court granted the motion.¹²⁸

The plaintiff relied heavily on a line of Indiana cases which state "that a cause of action accrues at the time injury is produced by wrongful acts for which the law allows damages susceptible of ascertainment. . . . In essence, a cause of action accrues when the alleged negligence culminates in injury to the plaintiff and damages resulting from that injury are ascertainable."¹²⁹ Although one might suppose that the plain meaning of "susceptible of ascertainment" would translate to "discoverable," that is not the interpretation adopted by the Indiana Supreme Court: "'For a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the damages be known or ascertainable but only that damage has occurred.'"¹³⁰

In applying the above rule, the district court found that "legal injury alleged by the plaintiff occurred on the date of insertion . . . in February 1972. The first evidence of damage appeared in July 1972 when plaintiff

of the disease. In other cases, x-rays and other screening tests would provide the evidence.

¹²¹723 F.2d at 529-31.

¹²²*Id.* at 531.

¹²³570 F. Supp. 1146 (N.D. Ind. 1983).

¹²⁴*Id.* at 1148.

¹²⁵*Id.* at 1149.

¹²⁶*See* IND. CODE § 34-1-2-2 (1982).

¹²⁷*See* IND. CODE § 26-1-2-725 (1982).

¹²⁸570 F. Supp. at 1156.

¹²⁹*Id.* at 1149 (citations omitted).

¹³⁰*Id.* at 1150 (quoting *Shideler v. Dwyer*, 417 N.E.2d 281, 289 (Ind. 1981)).

became pregnant and knew that the Dalkon Shield had failed in its intended purpose.”¹³¹ The court also noted that the plaintiff was put on notice that some elements of damage had occurred from 1972 to 1975. The court ruled that the statute of limitations commenced with such notice.¹³² With respect to this “wrongful life” segment of the claim, the court probably misapplied the rule from *Shideler*. Surely, the plaintiff’s knowledge of pregnancy is irrelevant to start the running of the statute of limitations. The critical time must either be the moment of conception or the moment of insertion of the device. The latter would be consistent with the “impact” rule¹³³ which can be restated as follows: If damages ultimately occur, the injury causing them will relate back to the time of the defendant’s wrongful act. Hindsight analysis will define that act as actionable even though it would not be actionable if in fact damages never occur. On the other hand, choosing the moment of conception to run the statute would be consistent with the view that some damages actionable at the time they commence must occur for a tort cause of action to accrue. The *Shideler* holding strongly suggests that actionable damages must have occurred in order to start the statute. But when the *Shideler* court quoted the *Schmidt* case and its impact rule without clearly limiting it, a period of confusion in this aspect of Indiana law was ushered in.¹³⁴

With respect to her health impairments following the birth of her child, the plaintiff argued that the “damages susceptible of ascertainment” language from earlier cases entitled her to a liberal discovery rule which would run the statute of limitations only when she became aware of the relationship of the Dalkon Shield to her health problems.¹³⁵ The court rejected the basic application of discovery principles to these cases in Indiana,¹³⁶ but noted in dicta that a due diligence standard would have found the plaintiff on reasonable notice of the origin of her ailments before she obtained actual knowledge of that origin.¹³⁷

The plaintiff also argued that the defendant had fraudulently concealed information by misrepresenting “pregnancy rates, complications, side effects, hazards and dangers and radiopacity of the Dalkon Shield in an active manner calculated to prevent the plaintiff from ascertaining that legal injury had been done to her.”¹³⁸ The court relied on *Pitts v.*

¹³¹570 F. Supp. at 1150.

¹³²*Id.* at 1151.

¹³³See *supra* notes 110-17 and accompanying text.

¹³⁴The majority in *Shideler* sought to establish the principle that irremediable harm had to occur in order for there to be a cause of action, 417 N.E.2d at 290-91, yet the decisions in *Braswell* and *Tolen* suggest that the court was less than successful.

¹³⁵570 F. Supp. at 1150.

¹³⁶*Id.* at 1151.

¹³⁷*Id.* at 1150 n.2.

¹³⁸*Id.* at 1152.

*Unarco Industries, Inc.*¹³⁹ to hold that affirmative acts of concealment are necessary to trigger the fraudulent concealment doctrine, which would in turn toll the statute of limitations.¹⁴⁰ In determining the fraudulent concealment doctrine was inapplicable, the court noted this was “not a case in which plaintiff was hindered by the action or lack of action on the part of Robins from filing a complaint during the period when she could have brought this lawsuit.”¹⁴¹ In addition, any possible concealment was found to have ended in 1974 when Robins informed the plaintiff’s physician that the Dalkon Shield had been taken off the market.¹⁴²

The court declined to treat the plaintiff’s fraud allegations as a special cause of action for statute of limitation purposes: “It is the well established rule in Indiana that in determining what period of limitations applies the essence of the action controls rather than the form in which it is pleaded.”¹⁴³ In this case, negligence, strict liability, and warranty were the essential actions brought.

With respect to the allegation of a breach of express and implied warranties, the plaintiff sought to bring her claim under an exception to the Uniform Commercial Code’s statute of limitations which operates four years from the date of sale.¹⁴⁴ This exception provides that a breach of warranty occurs upon delivery, “except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”¹⁴⁵ The manufacturer had stated in its literature that the Dalkon Shield would protect women “[f]or a period of several years. Some women have been effectively protected by the same I.U.D. for five years or longer”¹⁴⁶

The interpretation of this UCC provision is one of first impression in Indiana, but elsewhere courts have required there to be a specific reference to a future time in the warranty, “even though all warranties in a sense apply to future performance of goods.”¹⁴⁷ Although certain express warranties such as lifetime guarantees “have been found to extend explicitly to future performance,”¹⁴⁸ most courts have ruled that

¹³⁹712 F.2d 276, 279 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 509 (1983). *See supra* notes 90-93 and accompanying text.

¹⁴⁰570 F. Supp. at 1151.

¹⁴¹*Id.* at 1152 (citations omitted).

¹⁴²*Id.*

¹⁴³*Id.* at 1155 (citations omitted).

¹⁴⁴This provision operates in Indiana as IND. CODE § 26-1-2-725 (1982).

¹⁴⁵*Id.* § 26-1-2-725(2).

¹⁴⁶570 F. Supp. at 1153 (quoting *Answers to your Patients' Questions*, a brochure for patients using the Dalkon Shield).

¹⁴⁷*Id.* (quoting J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 11-9, at 419 (2d ed. 1980)) (citations omitted).

¹⁴⁸570 F. Supp. at 1154.

implied warranties by their nature cannot provide the explicitness required to trigger the exception.¹⁴⁹ The representation that the Dalkon Shield would work “[f]or a period of several years”—clearly does not meet the exception because it does not meet the requirement of a ‘specific reference to a future time period.’”¹⁵⁰

3. *Property Damage*.—The fact that the time of accrual of a tort action is not well-settled in Indiana courts was brought home in *Monsanto Co. v. Miller*.¹⁵¹ In that case, the interior of the plaintiff’s silo was coated with cumar manufactured by Monsanto. The cumar contained PCB’s which contaminated the milk from the plaintiff’s cows which were fed on the silage stored within the silo.

The trial court denied the defendant’s motion to dismiss in which it had been argued that the Indiana Product Liability Act’s statute of limitations covering property damage¹⁵² had run two years after the Monsanto cumar had been applied to the silo. In affirming, the court of appeals ruled that injury, the wrongful act, had occurred when the cumar was applied, but as of that moment no damages were ascertainable and therefore no cause of action had accrued.¹⁵³

Even the discovery of PCB’s in the milk of the cows in 1976 would not give rise to the accrual of a cause of action if the PCB count were below the Indiana permissible level. It was only when the PCB count rose to an amount in violation of the Indiana regulation that a cause of action against Monsanto would possibly accrue.¹⁵⁴

The court made clear that the plaintiff’s discovery of injury was unnecessary to start the limitations statute running, rather there had to be some damages susceptible of ascertainment.¹⁵⁵ When those damages were actionable was a question of fact. Thus, the case was remanded for findings.¹⁵⁶

4. *Product Liability Act Repose Statute*.—Although it is generally unnecessary under a repose statute to determine when the plaintiff’s

¹⁴⁹*Id.*

¹⁵⁰*Id.*

¹⁵¹455 N.E.2d 392 (Ind. Ct. App. 1983).

¹⁵²IND. CODE § 33-1-1.5-5 (Supp. 1984) (quoted *supra* note 82).

¹⁵³455 N.E.2d at 395.

¹⁵⁴*Id.* at 397. If that moment occurred prior to July 28, 1976, plaintiff would be barred by the six year statute of limitations governing injuries to real property. *See* IND. CODE § 34-1-2-1 (1982). If it occurred after June 1, 1978, the effective date of the Product Liability Act, plaintiff would be barred under both the two year statute of limitations and the ten year repose provision found in section five of the Indiana Product Liability Act. IND. CODE § 33-1-1.5-5 (Supp. 1984) (quoted *supra* note 82). If the impermissible level were reached between those two dates, no Indiana statute of limitations would bar the action.

¹⁵⁵455 N.E.2d at 394.

¹⁵⁶*Id.* at 398.

cause of action accrues,¹⁵⁷ the moment of a defendant's wrongful act can be a matter for litigation. In *Bishop v. Firestone Tire & Rubber Co.*,¹⁵⁸ the defendants moved for summary judgment on the ground that they had delivered their products to initial users more than ten years prior to the filing of the plaintiff's claim for personal injury.

At the outset, it should be emphasized that statutes of limitation and statutes of repose are generally defenses.¹⁵⁹ Therefore, it is up to the defendant to prove when an allegedly defective product was launched into the stream of commerce. The task is seriously complicated by the requirement that it is the time of initial delivery which triggers the Indiana statute, not the time of manufacture.¹⁶⁰

In the instant case, there was no doubt but that the rim base and side ring of a multipiece rim assembly were manufactured in 1948 and 1941 respectively.¹⁶¹ The defendants offered evidence to the effect that these products had been sold to a user more than ten years prior to the plaintiff's accident which occurred on August 9, 1978. The defendant's evidence, however, was indirect. The Budd Company, purchaser of some of the assets of the original manufacturer of the rim base component, offered testimony that the strong demand for rim bases at the time of the 1948 manufacture, along with the company's no inventory of rims position during that period, made it virtually certain that a delivery had taken place in the late 1940's.¹⁶² The other defendant, Firestone, produced sales records for the ten year potential liability period to demonstrate that there was no record of sales of any units of the type involved in the accident.¹⁶³

In opposition to the defendant's summary judgment motion, the plaintiff's expert witness stated he had recently purchased a "new" rim assembly that was date stamped over twenty-five years earlier.¹⁶⁴ However, the court did not give the plaintiff's evidence any probative value because his statement was contradicted in part by an earlier admission, and the rim purchased was a type other than the one involved in the accident.¹⁶⁵ The defendant's summary judgment motions were granted.¹⁶⁶

¹⁵⁷See text accompanying note 107.

¹⁵⁸579 F. Supp. 397 (N.D. Ind. 1983)

¹⁵⁹See, e.g., FED. R. CIV. P. 8(c); IND. R. TRIAL P. 8(C).

¹⁶⁰See IND. CODE § 33-1-1.5-5 (Supp. 1984).

¹⁶¹579 F. Supp. at 399.

¹⁶²*Id.*

¹⁶³*Id.* at 403.

¹⁶⁴*Id.* at 407.

¹⁶⁵*Id.* at 409.

¹⁶⁶The *Bishop* case, 579 F. Supp. 397, reinforces the desirability of a manufacturer being able to positively trace the commercial paths of its units of production. If the recording of serial numbers is impractical, frequent cosmetic model changes may be desirable for traceability purposes alone.

As in *Pitts*¹⁶⁷ and *Tolen*,¹⁶⁸ the plaintiff in *Bishop* alleged fraudulent concealment seeking to toll the repose statute.¹⁶⁹ He did not present, however, any evidence in support of this allegation and it was rejected. Similar to the fraud claim in *Tolen*, the plaintiff also alleged there was a conspiracy "to continue the manufacture of multi-piece wheels . . . to withhold information regarding a different type of multi-piece wheel from certain governmental authorities."¹⁷⁰ As in *Tolen*, the court found that there was not an independent cause of action for conspiracy or fraud. If the statute bars the underlying action for negligence and strict liability the court reasoned, the claim should not be revivable simply by offering a new form of complaint.¹⁷¹

There is one additional issue raised by this case that was settled perhaps too summarily. Section five of the Indiana Product Liability Act refers to delivery to an "initial user."¹⁷² "User" under the Act "shall include: a purchaser; any individual who uses or consumes the product; or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question."¹⁷³ The court apparently interpreted the term "a purchaser" to mean any and all purchasers of products from manufacturers, whether they be middlemen, retailers, or persons who actually plan to put the product to its intended use.¹⁷⁴

It has been argued that the term purchaser in this context requires interpretation.¹⁷⁵ A literal approach would ignore the shelf life problem: where the manufacturer sells a defective product to a middleman who keeps it in inventory for a number of years.¹⁷⁶ It is not at all certain that the legislature intended for the repose statute to run during such an inventory period prior to the initial use of the product.¹⁷⁷

¹⁶⁷712 F.2d 276 (7th Cir. 1983). See *supra* notes 90-93 and accompanying text.

¹⁶⁸570 F. Supp. 1146 (N.D. Ind. 1983). See *supra* notes 138-43 and accompanying text.

¹⁶⁹579 F. Supp. at 411.

¹⁷⁰*Id.*

¹⁷¹*Id.*

¹⁷²IND. CODE § 33-1-1.5-5 (1982) (amended 1983) (current version at IND. CODE § 33-1-1.5-5 (Supp. 1984)).

¹⁷³*Id.* § 33-1-1.5-2 (Supp. 1984).

¹⁷⁴579 F. Supp. at 404. "The terms 'user or consumer' are defined by the relevant statute to include 'a purchaser.' Ind. Code § 33-1-1.5-2. Therefore, wholesale distributors and original equipment manufacturers are users and consumers for purposes of the statute." *Id.*

¹⁷⁵See Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 243 (1978).

¹⁷⁶See RESTATEMENT (SECOND) OF TORTS § 402A comment 1 (1965). The RESTATEMENT comment notes that users and consumers can acquire the product from "intermediate dealers," thus distinguishing users and consumers from dealers.

¹⁷⁷Following the survey period, this issue was joined in earnest in two cases in which opposite results were reached. In *Whittaker v. Federal Cartridge Corp.*, 466 N.E.2d 480 (Ind. Ct. App. 1984), the Indiana Court of Appeals reversed a trial court summary

5. *Indemnity*.—In *Coca-Cola Bottling Company-Goshen, Indiana v. Vendo Co.*,¹⁷⁸ the lessee of a soft drink vending machine brought suit against Coca-Cola, the lessor, for damages from a fire allegedly caused by a defect in the vending machine. The lessee's suit was brought on theories of strict liability, breach of warranty, and negligence.¹⁷⁹ Coca-Cola filed a third party complaint against the manufacturer of the machine, Vendo, and the manufacturer of the machine's compressor, Tecumseh, seeking indemnity for any damages Coca-Cola might incur as a result of the suit. After hearings, Coca-Cola's motion for summary judgment on the strict liability claim was granted, as were the third parties' motions for summary judgment on Coca-Cola's claims against them for indemnity. Coca-Cola then appealed from the adverse summary judgment on its third party claims.¹⁸⁰

On appeal, the court refused to abrogate Indiana's continued adherence to the common law rule that there should be no contribution

judgment, holding that delivery of a product to any purchaser "regardless of whether that purchaser is a retailer, dealer, or any other intermediary along the chain of distribution," *id.* at 481-82, would suffice to begin running the Indiana Product Liability Act repose provision. IND. CODE § 33-1-1.5-5 (1978) (amended 1983) (current version at IND. CODE § 33-1-1.5-5 (Supp. 1984)). The court of appeals rejected this literal interpretation of "users or consumers," including any and all purchasers, on two principal grounds.

The first was derived from the definition of "seller" found in the statute. IND. CODE § 33-1-1.5-2 (1978) (amended 1983) (current version at IND. CODE § 33-1-1.5-2 (Supp. 1984)). Section two provides that "seller" includes wholesalers, retail dealers, and distributors; seller and user are, therefore, mutually exclusive terms. The second ground is derived from the RESTATEMENT (SECOND) OF TORTS § 402A comment 1 (1965) which notes that a user may acquire the product directly from a manufacturer or from one or more intermediate dealers. The policy of protecting users and consumers, which is behind section 402A, reveals the distinction between "the using and consuming public on the one hand, and all those entities who have marketed the product, manufacturers and otherwise, on the other hand." 466 N.E.2d at 483. Indiana has adopted section 402A, *Cornette v. Searjeant Metal Prod. Inc.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970), and the Indiana Product Liability Act purports to restate the common law of the state. See IND. CODE § 33-1-1.5-3 (1982).

In *Wilson v. Studebaker-Worthington Inc.*, PROD. LIAB. REP. (CCH) ¶ 10,189 (S.D. Ind. Nov. 10, 1983), the district court confronted somewhat similar facts to *Whittaker*, but decided that it must defer to the plain language of the statute. In *Wilson*, the plaintiff argued that a defective component turbine did not reach an initial user until it was assembled as a pump and resold as a full assembly to an ultimate user. The court saw nothing in the statutory language about "ultimate" users or "final products" and held that delivery to any purchaser would be sufficient to begin the 10 year repose statute running.

There seems little doubt but that this issue is headed for resolution by the Indiana Supreme Court. It is predictable that the interpretation of sections two and five of the Act will be certified to the Indiana court if the diversity cases reach appeal first; further, with the present makeup of the supreme court, it is predictable that the literal interpretation of *Wilson*, *Bishop*, and *Whittaker* (at the trial level) will be upheld.

¹⁷⁸455 N.E.2d 370 (Ind. Ct. App. 1983).

¹⁷⁹*Id.* at 372.

¹⁸⁰*Id.*

among joint tort-feasors despite "the fact that forty-two states now provide some system for contribution by specific statute, as part of a comparative negligence system, or by judicial decision."¹⁸¹ The court noted that the prospective Indiana Comparative Fault Act will have the effect of limiting each primary tort-feasor's liability "to a percentage of the damages corresponding to that defendant's degree of fault."¹⁸²

The court acknowledged that indemnity is permitted in Indiana in circumstances where the third "party seeking indemnity is without actual fault but has been compelled to pay damages because of the wrongful conduct of another for which he is constructively liable."¹⁸³ This exception does not operate, however, where the party seeking indemnity "is guilty of actual negligence, whether malfeasance, misfeasance or nonfeasance,"¹⁸⁴ or where the seller has a duty to inspect when identical warranties have been issued to the consumer by it and the manufacturer, and an "inspection would have revealed the defect."¹⁸⁵ In addition, there can be no claim for indemnity until the indemnity claimant's liability to the injured person has been fixed. It is only at that point that the statute of limitations on the claim for indemnity begins to run.¹⁸⁶

Relying on the Indiana Products Liability Act,¹⁸⁷ the trial court determined that the lessor was not strictly liable to the lessee because the product had been delivered to an initial user more than ten years prior to the fire. If the lessor is considered to be a seller under the Act,¹⁸⁸ no indemnity claims against the two manufacturers based on tort product liability theories would stand.¹⁸⁹ If the lessor is not considered a seller, "any liability it incurs is upon some basis *other* than having

¹⁸¹*Id.*

¹⁸²*Id.* (footnote omitted). The Act, however, does not apply retrospectively.

¹⁸³*Id.* at 373 (citation omitted).

¹⁸⁴*Id.* (citations omitted).

¹⁸⁵*Id.* (citation omitted).

¹⁸⁶*Id.* at 374.

¹⁸⁷IND. CODE § 33-1-1.5-5 (1982) (amended 1983) (current version at IND. CODE § 33-1-1.5-5 (Supp. 1984)) (quoted *supra* note 82).

¹⁸⁸Under this section, product liability suits under strict liability and negligence theories are barred after the passage of ten years from initial delivery. Section six of the Act limits application of strict liability to the seller of a product. *Id.* § 33-1-1.5-3 (Supp. 1984).

¹⁸⁹455 N.E.2d at 374. Under Indiana common law, product lessors are generally considered sellers. *Gilbert v. Stone City Constr. Co.*, 171 Ind. App. 418, 422, 357 N.E.2d 738, 742 (1976). Under the Indiana Product Liability Act, as originally enacted, "seller" was defined as "a manufacturer, a wholesaler, a retail dealer or a distributor." IND. CODE § 33-1-1.5-2 (1982) (amended 1983). The *Vendo* court pointed out that even if the lessor in this case qualified as "a distributor," the plaintiff's claim was "barred by the ten (10) year limitation provision of IC § 33-1-1.5-5." 455 N.E.2d at 374. The 1983 amendment to section two of the Act states: "'Seller' means a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor." Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 2, § 2, 1983 Ind. Acts 1814, 1815 (codified at IND. CODE § 33-1-1.5-2 (Supp. 1984) (emphasis added)).

sold a defectively dangerous product.”¹⁹⁰ For example, one possible basis for liability other than the sale of a defective product would be that the lessor negligently maintained or inspected the vending machine. If this were the case, it would be barred from recovering contribution or indemnity under the common law rule regarding joint tort-feasors.¹⁹¹

With respect to the remaining theory of identical warranties, any indemnity claim by Coca-Cola against the component manufacturer, Tecumseh, was barred by Coca-Cola’s lack of privity with Tecumseh.¹⁹² However, an indemnity claim against Vendo under this theory was not automatically barred by the UCC statute of limitations, despite the passage of more than four years from the time Vendo sold the machine to Coca-Cola. The indemnity statute of limitations will begin running only when the lessor’s liability to the real property owner is fixed.¹⁹³

In summary, if Coca-Cola had become liable to the owner under a breach of implied warranty and this warranty had been held to have had the necessary identity with the implied warranty of merchantability which ran from Vendo to Coca-Cola when it originally sold the machine to Coca-Cola in 1961, Coca-Cola could have demanded indemnification by Vendo. Coca-Cola would have had to show, however, that since 1961 there had been no material alteration in the condition of the machine, that it had breached no duty to inspect for a defect which it could have discovered, and that the defect was not caused by old age beyond the contemplation of implied warranties.

The principal teaching of this case reaffirms that the UCC statute of limitations¹⁹⁴ is not a true repose statute. Each time the product is resold, or leased, the new seller begins a new exposure to liability. This exposure can reactivate the original seller’s liability through the mechanism of indemnity, despite the passage of the four year statutory limitation period.

D. Economic Loss: Tort v. Warranty

There are three types of harm that can occur as a result of using, consuming, or merely being in proximity to a defective product. These are personal injury, property damage, and economic loss. The latter includes loss of bargain as a result of the product failing to perform as expected, as well as the consequential damages of lost profits caused indirectly by the product’s malfunction. It is damage to the product itself caused by the defect, however, which frequently presents a classification problem.

¹⁹⁰455 N.E.2d at 374-75.

¹⁹¹*Id.* at 375.

¹⁹²*Id.*

¹⁹³*Id.* at 375-76.

¹⁹⁴*See* IND. CODE § 26-1-1-725 (1982) (Indiana’s codification).

Suppose, for example, that a steering component of a new automobile snaps while the car is in use. At once, the product suffers diminished value. At this point, express and implied warranties of quality may have been breached by the seller. Suppose further, that because of the broken steering, the car veers suddenly to the right and crashes into someone's porch. The damage to the porch is clearly classifiable as property damage. The damage to the bystanders on the porch and to the driver and passengers in the car, users, is clearly personal injury. But what is the damage to the car itself? Is it considered property damage; or is it part of the loss of bargain suffered by the car's purchaser which would make it entirely an economic loss?

The question is important in most jurisdictions because economic damages are generally not actionable under tort theories.¹⁹⁵ To recover for an economic loss, plaintiffs must invoke warranty law which is subject to the UCC defenses of privity,¹⁹⁶ notice,¹⁹⁷ disclaimer,¹⁹⁸ and a statute of limitations running from date of sale.¹⁹⁹

Privity can be a serious barrier to recovery in these cases, although generally it will be the purchaser who is seeking damages, for injury to the product itself, from his immediate seller. Notice, disclaimer, and the four year statute of limitations do, however, present formidable barriers to recovery. For this reason, the better rule distinguishes between catastrophic damage to the product and ordinary loss of bargain resulting from defective performance. The former is property damage actionable in tort; the latter requires warranty jurisprudence.

In *Sanco Inc. v. Ford Motor Co.*,²⁰⁰ the federal district court predicted Indiana would make the above distinction despite there being an Indiana case which permitted recovery for consequential economic damages, lost profits, flowing indirectly from negligently performed services.²⁰¹ The *Sanco* court held that tort recovery was available in Indiana only for physical harm, a concept which embraces personal injury, damage to property other than the product, and damage to the product itself "when damage is sudden and calamitous, resulting from an occurrence hazardous to human safety."²⁰² The court referred as well to the amended definition

¹⁹⁵See cases cited in *Sanco, Inc. v. Ford Motor Co.*, 579 F. Supp. 893, 896 (S.D. Ind. 1984).

¹⁹⁶U.C.C. § 2-316 (1976) (Exclusion or Modification of Warranties).

¹⁹⁷U.C.C. § 2-318 (1976) (Third Party Beneficiaries of Warranties Express or Implied). This section provides three alternative limits to the common law horizontal privity barrier. Vertical privity requirements are left up to state law. See *id.* official comment 3.

¹⁹⁸U.C.C. § 2-607(3)(a) (1976).

¹⁹⁹U.C.C. § 2-725 (1976).

²⁰⁰579 F. Supp. 893 (S.D. Ind. 1984).

²⁰¹*Id.* at 895 (discussing *Babson Bros. Co. v. Tipstar Corp.*, 446 N.E.2d 11 (Ind. Ct. App. 1983)).

²⁰²579 F. Supp. at 898.

of physical harm found in the Indiana Product Liability Act.²⁰³

In the instant case, the damages alleged by a purchaser of trucks included “nonfunctioning gauges, electrical shorts, relay failures, cracking windshields, and frame movement They did not expose plaintiff to any physical hazard Such circumstances require the conclusion that the safety-insurance policy of tort law is inappropriate in this case. Plaintiff’s remedy lies in the expectation-bargain protection policy of warranty law.”²⁰⁴ The defendant’s motion for summary judgment on the tort count was granted.

In *Sanco*, the purchaser was seeking recovery from the manufacturer, not the dealer from whom the trucks had been purchased. Under the remaining implied warranty count, the defendant manufacturer raised a privity defense.²⁰⁵ The plaintiff sought to invoke an exception to the privity barrier which is applicable to cases where the manufacturer’s agents participate “significantly in the sale by means of advertising and personal contact with the buyer.”²⁰⁶ The court held there was sufficient evidence of such a relationship between Ford and the dealer to warrant a denial of Ford’s motion for summary judgment on the implied warranty count.

E. Amendment to the Indiana Product Liability Act

In last year’s survey article several amendments to the Indiana Product Liability Act were reviewed.²⁰⁷ There was one change in the law that was discussed,²⁰⁸ however, that requires additional comment. The 1983 amendments introduced an “all reasonable” care limiting standard for product preparation, packaging, labeling, instructing for use, and sale²⁰⁹ to replace the former “all possible” care standard from the earlier statute, a standard taken from section 402A of the Restatement (Second) of Torts.²¹⁰ One of the drafters indicated that there was no

²⁰³“‘Physical harm’ means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic losses from such damage. (Underlined words added by amendment.)” *Id.* at 899 (quoting IND. CODE § 33-1-1.5-2 (Supp. 1984)).

²⁰⁴579 F. Supp. at 899.

²⁰⁵*Id.*

²⁰⁶*Id.*

²⁰⁷See Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 272-82 (1984).

²⁰⁸*Id.* at 278-79.

²⁰⁹Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 3, § 2.5, 1983 Ind. Acts 1814, 1815-16 (codified at IND. CODE § 33-1-1.5-2.5(b)(1) (Supp. 1984)).

²¹⁰RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965) states that strict liability applies although “the seller has exercised all possible care in the preparation and sale of his product”

intent "to change the standard as it existed under the former 'all possible care' language."²¹¹

The drafter is probably correct in the sense that no foreseeable change is likely in Indiana judicial interpretation of the two phrases. Yet, it should be emphasized that there are courts that would find a substantial difference in these standards. The all possible care standard invites decisions such as the New Jersey Supreme Court's holding in *Beshada v. Johns-Manville Corp.*²¹² That opinion held unequivocally that a product manufacturer is liable for failing to warn of unknowable dangers. The absolute liability standard of *Beshada* for warning, and by inference, design, cases is further than the vast majority of American courts have cared to go in other than defective manufacture cases.²¹³ Holding defendants liable for failing to carry out truly impossible duties is to cut the final link between tort law and fault. This would be a mistake because compensation for injury from genuinely blameless acts is better administered by pure insurance mechanisms. Tort law has proven to be a far too inefficient and uncertain a system to play the primary role in no fault compensation schemes.

It should be noted that the change in language does not return strict liability to a negligence standard. The statute explicitly states that the exercise of all reasonable care will *not* suffice to refute a plaintiff's prima facie case. What the change does suggest is that the boundaries of liability are set by the concept of possibility. This is a higher standard than negligence, but something less than absolute liability. The change in the Indiana law is a sensible one.

²¹¹See Vargo, *supra* note 207, at 279 (footnote omitted).

²¹²90 N.J. 191, 447 A.2d 539 (1982).

²¹³*Beshada* is analyzed in Leibman, *The Manufacturer's Responsibility to Warn Product Users of Unknowable Dangers*, 21 AM. BUS. L.J. 403 (1984). See also Berry, *The Implications of Beshada for Products Liability Actions: The Defense Viewpoint*, 5 DICTUM 6 (N.J.B.A. Young Law. Div., Nov. 1982); Placitella & Darnell, *Beshada v. Johns-Manville Products Corp.: Evolution or Revolution in Strict Products Liability?*, 51 FORDHAM L. REV. 801 (1983); Note, *Beshada v. Johns-Manville Products Corp.: Adding Uncertainty to Injury*, 35 RUTGERS L. REV. 982 (1983); Birnbaum & Wrubel, *The N.J. Supreme Court Breathes New Life Into State-of-Art Defense*, Nat'l. L.J., Sept. 17, 1984, at 22, col. 1; Birnbaum & Wrubel, *State-of-Art Evidence After Beshada: The Responses Conflict*, Nat'l L.J., Aug. 15, 1983, at 24, col. 1; Birnbaum & Wrubel, *N.J. High Court Blazes New Path in Holding a Manufacturer Liable*, Nat'l. L.J., Jan. 24, 1983, at 24, col. 1; Platt & Platt, *Moving From Strict to 'Absolute' Liability*, Nat'l. L.J., Jan. 17, 1983, at 15, col. 1.

XI. Professional Responsibility

G. KENT FRANDSEN*

A. Introduction

This past survey period was an active one for the Indiana Supreme Court and its Disciplinary Commission concerning the law of lawyering. The reported cases are instructive for counsel desirous of fulfilling their professional responsibilities. It is regrettable that there continues to be a litany of decisions dealing with an attorney's neglect of his client's legal matters.¹ The dominant focus of this Article, however, will be the changes in the Indiana Code of Professional Responsibility concerning attorney advertising and solicitation, pitfalls confronting the fiduciary relationship of attorney and client, circumstances allowing permissive withdrawal from employment, and the standard of proof required in a disciplinary proceeding.

B. Publicity, Advertising, and Solicitation

The 1977 decision of the United States Supreme Court in *Bates v. State Bar of Arizona*² ended the states' absolute restraint on attorney advertising. The following year, Indiana revised its Code of Professional Responsibility to bring it into conformity with the *Bates* decision, but stopped short of allowing the scope of advertising permitted under the amendment adopted by the American Bar Association.³ Further inroads were made on the states' ability to regulate attorney advertising with the 1982 Supreme Court's decision in *In re R.M.J.*⁴ Indiana responded to that

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¹See *In re Stivers*, 450 N.E.2d 531 (Ind. 1983) (After accepting employment to file a petition for postconviction relief in one client's case and to perfect an appeal for another client, respondent failed to take the necessary action and misrepresented the status of the cases to them.). *In re Roemer*, 455 N.E.2d 1123 (Ind. 1983) (Respondent was retained and paid to file a joint petition in bankruptcy yet failed to take action for approximately 10 months and failed to return clients' calls. In another case, respondent neglected to close an estate for four years and failed to forward executrix's money orders to discharge the estate's inheritance tax liability, all of which resulted in substantial interest penalties being assessed.). *In re Jones*, 455 N.E.2d 903 (Ind. 1983) (An agreed discipline of public reprimand resulted from respondent's failure to pursue an appeal as court-appointed counsel, while maintaining that an appeal had been filed.). *In re Holloway*, 452 N.E.2d 934 (Ind. 1983) (An agreed discipline of 45 days suspension resulted from several incidents in which respondent neglected to protect his clients' interest and misrepresented the status of cases.).

²433 U.S. 350 (1977).

³MODEL OF PROFESSIONAL RESPONSIBILITY (amended 1977).

⁴455 U.S. 191 (1982).

decision in January, 1984 when its supreme court adopted, virtually verbatim, a major revision of the Disciplinary Rules in Canon 2 of the Code that had been submitted by the State Bar Association's Committee on Lawyer Advertising.⁵

1. *Advertising.*—The thrust of the change in Disciplinary Rule 2-101⁶ is to expand the range of public media that can be utilized by attorneys in advertising their legal services. Additionally, rather than limiting the specific categories of information that an attorney can disseminate to the public, the new rule merely restates such categories and describes them as illustrative of the permissible areas of information that could be included in the public communication.⁷ Further, Disciplinary Rule 2-101(B) expressly forbids an attorney's use of a "false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim" in any public communication.⁸ This is consistent with the Supreme Court's view that such statements contained in commercial speech are not entitled to first amendment protection and, of course, are subject to state regulation.⁹ Indeed, such use would conflict with the premise that the major justification for attorney advertising is to "facilitate the process of informed selection of a lawyer by potential consumers of legal service."¹⁰ The test of whether or not a statement in a public communication is false, fraudulent, misleading, deceptive, self-laudatory or unfair is set forth in Disciplinary Rule 2-101(C).¹¹ Likewise, public communications that contain statements or data that tout "past performance" or "future success," endorsements or testimonials, photographs of any one other than the attorney, representations as to the "quality of legal services," and "appeals to a layperson's emotions" are similarly proscribed.¹² Finally, unless it is apparent

⁵IND. CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (amended by the Supreme Court of Indiana, January 14, 1984).

⁶IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1984). No longer prohibited is the attorney's use of television or telephone to advertise legal services, and the geographic limitation contained in the former rule has been deleted in the revision.

⁷*Id.* DR 2-101(B)(1)-(19).

⁸*Id.* DR 2-101(B).

⁹*See* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, & n.24 (1976).

¹⁰IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1984).

¹¹*Id.* DR 2-101(C). This section defines a "false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim" to include (1) a material misrepresentation of fact; (2) omission of any material fact necessary to make the statement not misleading; (3) statements intended or likely to create an unjustified expectation; (4) statements or implications that the attorney is a specialist, other than as permitted by Disciplinary Rule 2-104; (5) statements conveying the impression that the attorney is in a position to influence improperly any tribunal, or other public body or official; (6) a representation, express or implied, that is likely to cause a layperson to misunderstand or be deceived, or omits necessary disclaimers that would make the representation not deceptive. *Id.* DR 2-101(C).

¹²*Id.* DR 2-101(D)(1)-(7).

that the communication is an advertisement, it must be so identified, and a copy approved by the attorney must be retained for six years after its dissemination.¹³

2. *Use of Firm Names.*—Another important change in Canon 2 announces a standard by which an attorney can determine the permissible choice of names under which he may engage in the practice of law. Disciplinary Rule 2-102(B) provides that an attorney shall not use a name that misleads the public as to the “identity, responsibility or status” of the attorney in the firm.¹⁴ Additionally, the rule states that it is inherently misleading for an attorney engaged in the private practice to use a “trade name.”¹⁵ Unfortunately, the term “trade name” is not defined for purposes of Disciplinary Rule 2-102(B). Thus, attorneys using nontraditional names do so at some risk that the name will be found to be misleading. For example, “Indianapolis Legal Clinic” was deemed to be a prohibited trade name.¹⁶ Moreover, “The People’s Law Firm” was held to be misleading because of the possible inference that “the firm is controlled by the public, receives public funds for its existence, provides free legal services or is a nonprofit legal service.”¹⁷

3. *Solicitation.*—The revision of Disciplinary Rule 2-103 is a studied effort to bring the rule into conformity with several decisions that have addressed the limits of permissible attorney solicitation.¹⁸ Disciplinary Rule 2-103(A) provides:

A lawyer shall not seek or recommend, by in-person contact (either in the physical presence of, or by telephone), the employment, as a private practitioner, of himself, his partner, or

¹³*Id.* DR 2-101(E).

¹⁴*Id.* DR 2-102(B).

¹⁵*Id.*

¹⁶*In re Sekerez*, 458 N.E.2d 229 (Ind. 1984). Respondent was disbarred for violations of the Code, including practicing under a “trade name.” *Id.* at 242. The court concluded that since an attorney cannot practice under a trade name, he is prohibited from advertising such a trade name. *Id.* at 244.

¹⁷*In re Shepard*, 92 A.D.2d 978, 979, 459 N.Y.S.2d 632, 633 (1983).

¹⁸*See, e.g., In re R.M.J.*, 455 U.S. 191 (1982) (Supreme Court reversed the state court’s finding that respondent had violated its rules pertaining to attorney advertising and solicitation by a general mailing of announcement cards to persons other than those listed in the rules.); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (upholding the state’s right to prohibit in-person solicitation of accident victims); *In re Perrello*, 271 Ind. 560, 394 N.E.2d 127 (1979), *cert. denied*, 414 U.S. 878 (1973) (respondent disbarred for soliciting clients outside the courtroom). *See also Koffler v. Joint Bar Ass’n*, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied*, 450 U.S. 1026 (1981) (New York’s highest court refused to discipline attorneys for mailing letters soliciting real estate work from 7500 property owners). *But cf. In re Frank*, 440 N.E.2d 676 (Ind. 1982) (respondent agreed to a public reprimand for mailing solicitation letters to 20 persons that court records indicated were unrepresented defendants).

associate, to a non-lawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing.¹⁹

The foregoing section recognizes, implicitly, that an attorney may utilize nonsolicited mailings to *prospective* clients, although even that usage is not limitless. Disciplinary Rule 2-103(D) lists those circumstances in which an attorney shall not contact or send a written communication for the purpose of obtaining professional employment,²⁰ the most noteworthy being where "[t]he contact or written communication is based upon the happening of a specific event. . . ."²¹ Thus, an attorney would be prohibited from communicating with a prospective client after learning that the client may sustain financial loss as a result of a third party's filing of a petition in bankruptcy. If success in asserting rights for a current client in litigation is dependent upon the joinder of others, however, the attorney may solicit and accept employment "from those he is permitted under applicable law to contact for the purpose of obtaining their joinder."²²

Former Disciplinary Rule 2-104 contained exceptions to the general prohibition that an attorney shall not accept employment arising out of unsolicited advice to a layperson that he should obtain counsel to take legal action. Thus, an attorney would be permitted to "accept employment by a close friend, relative, former client . . . , or one whom the lawyer reasonably believe[d] to be a client," even though the attorney had given unsolicited advice to such person to take legal action.²³ Likewise, an attorney could "accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems . . . if such activities are conducted or sponsored by a qualified legal assistance organization."²⁴ Unfortunately, none of these exceptions were incorporated into the revision of the rule and it would seem that a technical amendment to correct this omission would be appropriate.

C. *Sixth Amendment Guarantee of Assistance of Counsel*

It often appears that the scorn a convicted defendant has for the quality of legal services afforded him by his court-appointed lawyer is exceeded only by the disfavor the courts attach to the defendant's claim that he has been denied his sixth amendment guarantee of effective assistance of counsel. This past survey period produced several noteworthy decisions that addressed the question of adequacy of counsel;²⁵ they are

¹⁹IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1984).

²⁰*Id.* DR 2-103(D)(1)-(4).

²¹*Id.* DR 2-103(D)(1).

²²*Id.* DR 2-103(B).

²³IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(1) (1983) (amended 1984).

²⁴*Id.* DR 2-104(A)(2).

²⁵*See* *Burton v. State*, 455 N.E.2d 938 (Ind. 1983); *Metcalf v. State*, 451 N.E.2d 321

noteworthy in that they underscored the exceedingly difficult task a defendant has in persuading a court that he should be given a new trial because of the ineffective representation afforded him by his attorney.²⁶ With one exception,²⁷ the courts rejected every allegation that an attorney's acts of omission or commission evidenced incompetence.²⁸ When presented the question of adequacy of the representation, the court looks to the facts in each case and applies the standard of whether the representation was a "mockery of justice,"²⁹ as modified by the requirement of "adequate legal representation."³⁰ In addition, this standard is implemented by a presumption that the defense counsel was competent; the burden then rests with the defendant to rebut this presumption by strong and convincing evidence.³¹

The exception, referred to above, is *Burton v. State*,³² wherein the court held that the constitutional guarantee of assistance of counsel extends to an indigent who is denied a meritorious appeal because his appellate counsel is ineffective. After Burton's conviction, his trial counsel preserved significant issues in his motion to correct errors, which was denied by the trial court.³³ Thereafter, a new attorney was appointed to pursue Burton's original appeal. The court of appeals affirmed the trial court.³⁴ At Burton's request, his appellate counsel withdrew her appearance, and his original counsel reentered the case and filed a petition to transfer, accompanied by an affidavit.³⁵ The defendant stated that he had had no contact or communication with his appellate counsel and that he had not been asked, nor had he consented, to waive any of the issues set forth in his motion to correct errors.³⁶ The supreme court held that the defendant was denied his due process right to effective representation because of the total inadequacy of the appellate counsel's attempted appeal.³⁷ The

(Ind. 1983); *Boone v. State*, 449 N.E.2d 1077 (Ind. 1983); *Jones v. State*, 449 N.E.2d 1060 (Ind. 1983); *Priest v. State*, 449 N.E.2d 602 (Ind. 1983); *Ward v. State*, 447 N.E.2d 1169 (Ind. Ct. App. 1983).

²⁶See, e.g., *Leaver v. State*, 414 N.E.2d 959 (Ind. 1981) (noting that there is a strong presumption that an attorney has fulfilled his duties to his client, and strong and convincing proof is required to overcome such a presumption; to prevail on a claim of incompetent counsel, it must be shown that what attorney did or did not do made the proceeding a mockery of justice shocking to the conscience of the court).

²⁷*Burton v. State*, 455 N.E.2d 938 (Ind. 1983).

²⁸See *supra* note 25.

²⁹*Williams v. State*, 445 N.E.2d 101, 102 (Ind. 1983).

³⁰See *Crips v. State*, 271 Ind. 534, 394 N.E.2d 115 (1979).

³¹See *Rinard v. State*, 271 Ind. 588, 394 N.E.2d 160 (1979); *Issac v. State*, 257 Ind. 319, 274 N.E.2d 231 (1971).

³²455 N.E.2d 938 (Ind. 1983).

³³*Id.* at 938-39.

³⁴*Id.* at 939.

³⁵*Id.*

³⁶*Id.* at 940.

³⁷*Id.* at 939.

original appellate counsel's brief to the court "neither raised the issues [that were properly preserved in the motion to correct errors] nor brought up all of the Record necessary to show that they were properly presented before the trial court."³⁸ Further, the issues that were raised on appeal "were so inadequately presented that they could hardly be discerned, let alone decided."³⁹

In *Metcalf v. State*,⁴⁰ the supreme court rejected a defendant's claim of ineffective representation where the attorney's tactical or strategic decision may, in retrospect, have proven detrimental. The questioned tactics included a waived opening statement, the counsel's decision not to call a defense witness, and an alleged refusal by the attorney to allow his client to take the stand. The court noted that decisions concerning whether to call a witness to testify and whether to make an opening statement are strategy calls that reside with the attorney.⁴¹ The court stated, "Deliberate choices by attorneys for some tactical or strategic reason do not establish ineffective representation even though such choices may be subject to criticism or the choices ultimately prove detrimental to the defendant."⁴² At a postconviction relief hearing, the conflicting testimony concerning whether the attorney had denied the petitioner the right to testify in his own behalf or, rather, had accepted his counsel's advice that taking the stand would be unwise was resolved by the trial court in favor of the attorney.⁴³

Because the issue of inadequacy of counsel is raised most frequently in petitions for postconviction relief, it is imperative for the petitioner to make a record at the postconviction relief hearing that establishes the specific deficiencies in his counsel's representation that resulted in the alleged denial of his constitutional rights. The petitioner bears the burden of establishing his grounds for relief by a preponderance of the evidence.⁴⁴ Because the trial judge is the sole judge of the weight of the evidence, it is only where "the evidence is without conflict and leads solely to a result different from that reached by the trial court" that the decision will be set aside.⁴⁵

In *Priest v. State*,⁴⁶ the petitioner contended that his attorney's failure

³⁸*Id.*

³⁹*Id.* at 938-39.

⁴⁰451 N.E.2d 321 (Ind. 1983).

⁴¹*Id.* at 321.

⁴²*Id.* at 324 (citing *Cobbs v. State*, 434 N.E.2d 883 (Ind. 1982)).

⁴³451 N.E.2d at 324. Appellant's contentions were in direct conflict with other testimony and were resolved on credibility. The court noted that "[t]he trial judge did this and we leave it to his judgment." *Id.*

⁴⁴*Id.* at 323 (citing *Cobbs v. State*, 434 N.E.2d 883 (Ind. 1982)).

⁴⁵451 N.E.2d at 323 (citing *Tessely v. State*, 432 N.E.2d 1374 (Ind. 1982)).

⁴⁶449 N.E.2d 602 (Ind. 1983).

to timely file a notice of alibi and present an alibi witness demonstrated the attorney's incompetency. On appeal, the supreme court affirmed the trial court's findings: (1) that the attorney had attempted to locate the allegedly favorable witness and (2) that the failure of the witness to appear for scheduled meetings or to attend the trial was more likely attributable to her decision not to perjure herself.⁴⁷ The court cited *Williams v. State*⁴⁸ which contains the following quote: "It is a rare occasion when a single omission or commission by counsel will be so grievous as to deny the defendant a fair trial."⁴⁹

Similarly, in *Boone v. State*,⁵⁰ the trial counsel's failure to request that the voir dire examination be recorded was held not to constitute ineffective assistance of counsel. On appeal from the denial of a petition for postconviction relief, the court rejected the petitioner's argument that the jurors were potentially biased against him because they had previously served on a jury that had convicted another defendant on a similar charge. The only evidence in the record that the jurors were biased was the petitioner's unsubstantiated opinion which, the court noted, the trial court was not obligated to credit.⁵¹ The cases demonstrate that when the record discloses that the defense counsel adequately cross-examined witnesses and made appropriate objections and motions on the defendant's behalf, the court is indisposed to find that the level of representation was perfunctory or a "mockery of justice."⁵²

D. Conflicts of Interest

Ethical Consideration 5-1 of the Code of Professional Responsibility states the principle: "The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client and free of compromising influences and loyalties."⁵³ Five recent disciplinary proceedings illustrate the relative ease that an attorney's violation of that principle can result in a finding of misconduct.

1. *Business Relationships*.—In *In re Pitschke*,⁵⁴ the respondent undertook to represent the husband in a child custody dispute. During the representation, the respondent had business dealings with her client. These dealings consisted of providing him an apartment, lending him money, and consigning valuable books for possible sale in his business.

⁴⁷*Id.* at 604.

⁴⁸445 N.E.2d 101 (Ind. 1983).

⁴⁹*Id.* at 102 (quoting *Bowen v. State*, 263 Ind. 558, 556, 334 N.E.2d 691, 696 (1975)).

⁵⁰449 N.E.2d 1077 (Ind. 1983).

⁵¹*Id.* at 1079.

⁵²*See, e.g., Metcalf v. State*, 451 N.E.2d 321 (Ind. 1983); *Jones v. State*, 449 N.E.2d 1060 (Ind. 1983).

⁵³IND. CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1984).

⁵⁴455 N.E.2d 943 (Ind. 1983).

Pursuant to an agreement between the husband and his former wife, the husband was to return their child at a prearranged time. The preceding day, however, the husband delivered the child to his aunt who was to care for the child until he returned home from a trip out of the city. After several attempts to reach the husband to see if he had sold the books, the respondent called the aunt and learned the child was with her, and that she had not heard from the child's father. The respondent then advised the aunt of her business dealings with the husband and expressed concern that perhaps he might be considering taking the books, kidnapping the child, and disappearing.⁵⁵ The respondent spoke with her client the day the child was to be returned to the ex-wife, but she was still suspicious. The respondent again called the aunt, and told her to deliver the child to her office that afternoon. It was not until the Indianapolis Police Department intervened in the matter that the respondent released the child to the child's mother.⁵⁶ A fair reading of the opinion suggests that the respondent was using the child as a pawn to secure her investment in the client's business.

Although the court concluded the respondent had engaged in misconduct, it unfortunately did not cite to a specific Disciplinary Rule that had been violated.⁵⁷ The court merely held that the respondent had allowed her personal financial interests to interfere with her professional obligations. This case, however, may be the first Indiana decision in which the court announces *sub silentio* that a clear violation of an Ethical Consideration can constitute professional misconduct.

An attorney who enters into a business relationship with a client must pay close heed to the admonishment of Disciplinary Rule 5-104.⁵⁸ The possibility that the business will fail requires an attorney to disclose fully the potential for differing interests with his joint venturer. Further, where the client expects the attorney to exercise professional judgment in the business for the client's protection, the client's consent must be obtained before undertaking the representation.⁵⁹

⁵⁵*Id.* at 944.

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104 (1984).

⁵⁹*See id.* EC 5-2 ("A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."). Moreover, Ethical Consideration 5-3 provides, in part:

Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure.

Id. EC 5-3.

In *In re Aspinall*,⁶⁰ the court accepted the client's perception that the role the attorney would play in the business was to perform legal services and act in a fiduciary capacity for his client. The attorney viewed his contribution of professional legal services to the business as the quid pro quo of his client's investment of capital.⁶¹ The attorney failed to set forth the nature of his own interests which were different from those of his client. This fact, coupled with evidence establishing that the attorney failed to prepare and maintain corporate records and resolutions, and failed to disclose the financial plight of the business in a prompt fashion, supported the court's finding that the attorney had engaged in professional misconduct that warranted the agreed discipline of public reprimand.⁶²

2. *Dual Representation: Client-Adverse Witness*.—In 1942, the Supreme Court of the United States, in *Glasser v. United States*,⁶³ overturned a criminal conviction on the ground that a lawyer's dual representation of codefendants with conflicting interests is a denial of a defendant's sixth amendment right to effective assistance of counsel.⁶⁴ While the dual representation in *Glasser* involved codefendants charged with the same crime and tried together, the petitioner in *Ward v. State*⁶⁵ argued on direct appeal that the same result should occur where his court-appointed counsel was also attorney of record for one of the state's witnesses. The court of appeals acknowledged, "Although the concurrent representation of an adverse witness and a defendant, without the defendant's knowledge and consent, violates the constitutional right to effective counsel, mere dual representation does not create such a violation."⁶⁶ When Ward's attorney learned that one of his current clients in an unrelated case would testify for the state, he had no further contact with him. At the hearing for postconviction relief, the petitioner testified that

⁶⁰455 N.E.2d 942 (Ind. 1983).

⁶¹*Id.* at 943. Client, respondent, and another went into business in which the "[r]espondent was to provide legal services in organizing the business and handling automobile title transactions, provide office and telephone facilities, keep the books for the business, and generally assist in operating the business." *Id.* at 942.

⁶²*Id.* at 943. (notwithstanding respondent's loss of \$12,000 which respondent had invested in the corporation).

⁶³315 U.S. 60 (1942).

⁶⁴*Id.* at 76. See also U.S. CONST. amend. VI. This amendment states:
Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for this defence.
U.S. CONST. amend. VI.

⁶⁵447 N.E.2d 1169 (Ind. 1983).

⁶⁶*Id.* at 1170 (citing *Cowell v. Duckworth*, 512 F. Supp. 371, 373 (N.D. Ind. 1981)).

he was aware of the dual representation, yet he wanted his attorney to continue to represent him.⁶⁷ The court found that the record supported the determination that the petitioner was not forced to go to trial represented by an attorney with possible conflicts of interest; therefore, to prevail on the question, he would have to show that an actual conflict existed that affected the attorney's performance.⁶⁸ The court's studied review of the record revealed that the attorney had vigorously cross-examined the state's witness, and had elicited information from the witness regarding the charges pending against him, his hopes for a reduced sentence in return for his work as an informant, and the payments made to him by the state for his expenses.⁶⁹ Additionally, the court noted, "There is no indication that [the attorney] had obtained any confidential information relevant to cross-examination from his representation of [the witness] which he was reluctant to use because of his ethical obligations to maintain client confidences."⁷⁰ The court held that the record supported the trial court's determination that the attorney's duty to represent the petitioner with independence and zeal was not compromised or impaired by his concurrent representation of the state's witness.⁷¹

3. *Public Official*.—An attorney serving as prosecutor while maintaining his private practice is especially vulnerable to criticism and charges of conflicts of interest. In *In re Thrush*,⁷² an attorney who opted to continue his private practice, after being elected prosecuting attorney, was retained by a husband to initiate a dissolution of marriage proceeding. The following day, the wife went to the office of the respondent's deputy to complain that her husband had committed a battery against her. An affidavit of probable cause was filed by the deputy prosecutor, and a warrant was issued for the husband's arrest. The next day the wife's attorney filed a petition for dissolution of marriage on her behalf. Without knowledge of either of the foregoing events, the respondent filed a similar petition on behalf of the husband. When informed that the wife had already filed her petition, the respondent designated the husband's petition a counter-petition. Thereafter, the respondent learned of the criminal charges against his client and that the wife objected to his continuing to represent her husband because of his position as prosecutor. Notwithstanding the dictates of Disciplinary Rule 2-109(B)(2),⁷³ requiring his

⁶⁷447 N.E.2d at 1171.

⁶⁸*Id.* The court recognized that unconstitutional multiple representation is never harmless error; thus, prejudice need not be established. *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)). The court concluded the appellant would have first to show that an actual conflict impaired his attorney's performance to demonstrate an unconstitutional multiple representation. 447 N.E.2d at 1171.

⁶⁹447 N.E.2d at 1171.

⁷⁰*Id.*

⁷¹*Id.* at 1171-72.

⁷²448 N.E.2d 1088 (Ind. 1983).

⁷³IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109(B)(2) (1984).

mandatory withdrawal, the respondent requested that the wife's attorney sign a waiver of objections. When apprised that a complaint might be filed with the Disciplinary Commission, the respondent stated that he would withdraw his appearance in the civil matter but would also dismiss the criminal charges pending against his client. Nine days after the wife filed a grievance, the respondent withdrew his appearance.⁷⁴

By that time, the misconduct had occurred. The court held that the dual representation compromised the respondent's independent professional judgment owed to his clients. Additionally, the threatened use of the power of his public office in order to gain an advantage in a civil case constituted a betrayal of the interests of his client, the state, and was prejudicial to the administration of justice.⁷⁵

4. *Loyalty to Former Client.*—Since the adoption of the Code, decisions and opinions indicate that its drafters intended to include the former client within the purview of Disciplinary Rule 5-105,⁷⁶ at least with respect to matters that arise out of or are closely related to the subject matter of the former representation.⁷⁷ There appear to be two rationales for the prohibition contained in Disciplinary Rule 5-105: (1) the duty of loyalty to a former client survives the termination of the attorney-client relationship,⁷⁸ and (2) the possibility that through the former representation the attorney acquired information amounting to a client confidence.⁷⁹ Few believe that a lawyer who represents a client is disqualified for the rest of his life from accepting employment by a person having an interest which may conflict with that of the prior client.⁸⁰ Yet, where the subsequent matter is "substantially" related to that involved in the previous representation, the attorney must be disqualified. The test of "substantially" related is met, and disqualification must occur, where it is shown that the controversy involved in the pending case is substantially related to a matter in which the attorney previously represented another client.⁸¹ "This test must be applied to the facts of each case to determine whether

⁷⁴448 N.E.2d at 1089.

⁷⁵*Id.*

⁷⁶See *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 394 n.63 (S.D. Tex. 1969).

⁷⁷See *In re Evans*, 113 Ariz. 458, 461, 556 P.2d 792, 795 (1976) (forbidding attorneys to prepare an agreement for one party and subsequently to sue on behalf of another party attacking the validity of the same agreement).

⁷⁸See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1322 (1975); *id.*, Informal Op. 1349 (1975) (former counsel for corporation and its board of directors may not subsequently initiate or participate in a minority shareholder's suit against a board member and a majority shareholder).

⁷⁹See *Walker v. State*, 401 N.E.2d 795 (Ind. Ct. App. 1980); *Branan v. State*, 161 Ind. App. 443, 316 N.E.2d 406 (1974).

⁸⁰See *Thomas v. State*, 512 S.W.2d 116 (Mo. 1974); *Kerr v. State*, 584 S.W.2d 626 (Mo. Ct. App. 1979).

⁸¹See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1322 (1975).

the issues in the prior and present cases are essentially the same or closely interwoven therewith."⁸²

In *In re Zinman*,⁸³ two years after he had represented a woman in a dissolution of marriage in which she was awarded custody of a minor child, the respondent accepted employment by the former husband and his mother to modify the dissolution of marriage decree as to visitation for the minor child's grandmother. The court concluded that the respondent's second representation was substantially related to the initial controversy and resulted in a violation of the Code of Professional Responsibility.⁸⁴

E. *Withdrawal from Employment*

After accepting employment, one of the cardinal principles guiding every attorney is the duty to carry out the representation in complete loyalty to the best of his abilities.⁸⁵ Yet, the Code anticipates that situations may arise that will allow or require an attorney to withdraw his appearance.⁸⁶ A decision by the attorney to withdraw, however, should

⁸²*In re Zinman*, 450 N.E.2d 1000, 1002 (Ind. 1983) (quoting *State ex rel. Meyers v. Tippecanoe County Court*, 432 N.E.2d 1377, 1378 (Ind. 1982)).

⁸³450 N.E.2d 1000 (Ind. 1983).

⁸⁴*Id.* at 1002.

⁸⁵IND. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-31, DR 7-101(A)(1)-(3) (1984).

⁸⁶*Id.* DR 2-109(A), (B), (C). These sections state, in pertinent part: Withdrawal from Employment.

(A) In General.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

. . . .

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

. . . .

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to

be made only on the basis of "compelling circumstances."⁸⁷ Further, Ethical Consideration 2-32 alerts the attorney of the obligation to comply with a tribunal's rule regarding withdrawal.⁸⁸

In *Hawblitzel v. Hawblitzel*,⁸⁹ a dissolution of marriage case, the court of appeals held that the trial judge did not abuse his discretion in allowing the attorney for the wife to withdraw his representation on the day of trial, notwithstanding the court's own rule which provided that a motion to withdraw would not be granted unless ten days notice had been given.⁹⁰ The evidence disclosed that the wife had been subpoenaed to attend a deposition scheduled for the day before the trial. When her attorney advised her of the consequences of her failure to appear at the deposition, she accused him of the theft of some of her property. In turn, she was informed of the attorney's intent to withdraw and of her need immediately to obtain substitute counsel to represent her both at the deposition and at the trial. The following morning, the court granted the attorney's oral motion for leave to withdraw.⁹¹ That afternoon, the court proceeded with the scheduled trial without an appearance being made on behalf of the wife. At no point in the proceedings did the wife appear and request a continuance or otherwise seek relief from the court.⁹²

withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

.

(6) He believes in good faith, in a proceeding pending before a tribunal that the tribunal will find the existence of other good cause for withdrawal.

Id. (footnotes omitted).

⁸⁷*Id.* EC 2-32. This section states:

A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

Id. (footnotes omitted).

⁸⁸*Id.*

⁸⁹447 N.E.2d 1156 (Ind. Ct. App. 1983).

⁹⁰*Id.* at 1158-59 & n.1.

⁹¹*Id.* at 1157-58.

⁹²*Id.* at 1158.

In view of the wife's generally recalcitrant behavior throughout the entire proceedings and her accusations of theft, in particular, the court of appeals is to be commended for its conclusion that "counsel . . . was pursuing a course of action that was reasonable under the circumstances."⁹³ In a concurring opinion, Judge Staton viewed the trial court's refusal to apply its own rule requiring ten days notice in motions to withdraw as an abuse of discretion, but, reluctantly, agreed that the issue had been waived in this appeal.⁹⁴

F. Standard of Proof in Attorney Misconduct Proceedings

A disciplinary proceeding is neither civil nor criminal—the proceeding is *sui generis*.⁹⁵ Although the hearing officer conducts a hearing and submits his findings, which may include a proposed sanction, the ultimate fact finder in an attorney disciplinary proceeding in Indiana is the supreme court.⁹⁶ In *In re Moore*,⁹⁷ the respondent challenged the "preponderance of the evidence" standard found in the court's disciplinary rules.⁹⁸ He argued that procedural due process requires the issue of attorney misconduct involving unlawful behavior to be determined at no less than the "clear and convincing" standard of proof.⁹⁹ The court concluded that the United States Constitution does not mandate a rigidly defined standard of proof in such proceedings in view of the panoply of other rights afforded an attorney charged with professional misconduct.¹⁰⁰ Even though

⁹³*Id.*

⁹⁴*Id.* at 1165 (Staton, J., concurring).

⁹⁵See *In re Mills*, 539 S.W.2d 447, 450 (Mo. 1976) ("A disciplinary proceeding is not a 'criminal prosecution'; it is a proceeding '*sui generis*,' in the nature of an inquiry by the court into the conduct of its officer for the protection of the public, the courts and the profession.") (citations omitted).

⁹⁶*In re Callahan*, 442 N.E.2d 1092 (Ind. 1982); *In re Murray*, 266 Ind. 221, 362 N.E.2d 128 (1977), *appeal dismissed*, 434 U.S. 1029 (1978).

⁹⁷453 N.E.2d 971 (Ind. 1983).

⁹⁸IND. R. ADMISS. & DISCP. 23 § 14(f). The section provides, in part: "Within thirty (30) days after the conclusion of the hearing, the hearing officers shall determine whether misconduct has been proven by a *preponderance of evidence and shall submit to the Supreme Court written findings of fact.*" *Id.* (emphasis added).

⁹⁹453 N.E.2d at 972. The respondent cited *Santosky v. Kramer*, 455 U.S. 745 (1982), wherein the Court noted that an intermediate standard of proof is mandated where "the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" 455 U.S. at 756 (citation omitted). The intermediate standard was also found "necessary to preserve fundamental fairness in . . . government-initiated proceedings that threaten the individual . . . with 'a significant deprivation of liberty' or 'stigma.'" *Id.* (citations omitted).

¹⁰⁰453 N.E.2d 972-73. The court stated, "The interests at stake in the present proceeding are those associated with the judicial license to practice law in this jurisdiction." *Id.* They are clearly distinguishable from those liberty interests incidental to family life, civil commitment, deportation, or denaturalization. *Id.*

an intermediate standard of proof may not be required, however, the court reasoned “that such standard is an appropriate description of the level of confidence the fact finder should have in the correctness of his conclusions.”¹⁰¹ Thus, attorney misconduct will be established only upon “clear and convincing” evidence, and Indiana joins the majority of states utilizing that standard of proof,¹⁰² although there has been no formal amendment to Rule 23.

¹⁰¹*Id.* at 973. “Clear and convincing” has been described as proof which should leave no doubt in the mind of the trier of fact concerning the truth of the matters in issue. *In re Jones*, 34 Ill. App. 3d 603, 608, 340 N.E.2d 269, 273 (1975).

¹⁰²See *In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979), and cases cited therein.

XII. Property

WALTER W. KRIEGER*

A. Adverse Possession

The requirement that the possession necessary to acquire title by adverse possession¹ be "hostile"² was at issue in *Poole v. Corwin*.³ In *Poole* the Indiana Court of Appeals interpreted a provision in a deed, declaring that the deed would be void and the property would revert to the grantor or his heirs if the grantee railroad should ever fail to maintain a passenger depot on the adjoining tract of land, to create a fee simple determinable in the railroad with a possibility of reverter.⁴ A passenger depot had not been maintained on the adjoining tract of land since 1957; and in 1980, the Penn Central Railroad Corporation, the grantee's successor in interest, sold the property to Poole. Poole brought an action to quiet title based on adverse possession, but the trial court granted summary judgment for Corwin's descendants. On appeal, Corwin argued that the possession by Penn Central after the depot was closed on the adjoining property, and, therefore, the possession of Poole, was not "hostile" since the initial entry was subservient to Corwin's possibility of reverter, and that the possession could not become hostile until Corwin was given actual notice that the possession was no

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¹To acquire title by adverse possession the possession must be: (1) actual, (2) visible, (3) open, (4) notorious, (5) exclusive, (6) under a claim of ownership, (7) hostile, and (8) continuous for the statutory period of limitations. *Piel v. Dewitt*, 170 Ind. App. 63, 69, 351 N.E.2d 48, 53 (1976). In Indiana, the statutory period necessary to acquire title by adverse possession is 10 years. IND. CODE § 34-1-2-2 (1982). The adverse possessor must also pay all taxes on the property. IND. CODE § 32-1-20-1 (1982). However, in boundary line disputes where the payment of taxes will not serve as notice to the record titleholder, the statute requiring the payment of taxes is not a supplementary element of adverse possession. *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955); *Klein v. Kramer*, 179 Ind. App. 592, 386 N.E.2d 982 (1979).

²Where a life tenant, co-owner, tenant, purchaser under contract, or member of the owner's family takes possession of the property, such possession is not inconsistent with or adverse to the title of the remainderman, co-owner, landlord, vendor, or owner. See 3 AMERICAN LAW OF PROPERTY § 15.4a (Supp. 1976). In order to make such possession hostile, and thus begin the running of the statute of limitations, the possessor must give notice to the owner that he is acting adversely. *Piel v. DeWitt*, 170 Ind. App. 63, 351 N.E.2d 48 (1976).

³447 N.E.2d 1150 (Ind. Ct. App. 1983).

⁴*Id.* at 1151.

longer subservient to his title.⁵ The court agreed that "where entry upon the land [is subordinate] to the title of another, the statutory period for adverse possession does not begin to run until the occupant clearly disclaims and disavows the title of the true owner."⁶ The court did not agree, however, that "actual notice" to the owner was required, finding that "constructive notice" is sufficient "[w]hen hostile acts are so manifest and notorious that a reasonable owner should have been aware of them."⁷ The court concluded that because it was common knowledge that the railroad no longer maintained a passenger depot on the adjoining land, the railroad and Poole's possession was hostile, and Poole acquired title by adverse possession.⁸

Although the court did not cite *Piel v. DeWitt*⁹ which held that actual notice was required to begin the period of adverse possession running against a remainderman, had it done so, it could have easily distinguished the *Piel* notice requirement. In *Piel*, the life tenant, believing herself to be the owner of the fee, executed a warranty deed to the grantee purporting to convey a fee simple absolute title. The deed, together with an affidavit of transfer, was properly recorded, and the grantee took possession and paid the taxes on the property for the period of time necessary to acquire title by adverse possession. Nevertheless, the court held that the possession was not adverse to the remainderman since "[a]bsent actual notice, the life tenant cannot possess the land adverse to the remainderman."¹⁰ A remainderman would have no reason to suspect that a life tenant was acting adverse to his interest, and in *Piel* the court held that the remainderman had no duty to search the public records to see if the life tenant had attempted to wrongfully convey his interest.¹¹ One could make a strong argument that the possession by the holder of a fee simple determinable is less subservient to the title of the holder of the possibility of reverter than is the possession of a life tenant to the interest of the remainderman, and therefore, the holder of the possibility of reverter should be required to inspect the land to ensure the condition (special limitation) has not been violated. The scant authority on point supports the position taken by the court, requiring "constructive notice" to the holder of the possibility of reverter.¹² Since the court concluded that an "open and notorious" act can

⁵*Id.* at 1152.

⁶*Id.* (citation omitted).

⁷*Id.*

⁸*Id.* at 1152-53.

⁹170 Ind. App. 63, 351 N.E.2d 48 (1976).

¹⁰*Id.* at 67, 351 N.E.2d at 52.

¹¹*Id.* at 72-73, 351 N.E.2d at 55. A similar result would follow in the case of cotenants. See *Hare v. Chisman*, 230 Ind. 333, 342, 101 N.E.2d 268, 279 (1951).

¹²*School Dist. Township of Richland v. Hanson*, 186 Iowa 1314, 173 N.W. 873 (1919).

constitute constructive notice, however, the notice requirement in such cases does not appear to place an undue burden on the party claiming title by adverse possession.

B. Concurrent Estates and Partition

Generally speaking, a tenant in common or a joint tenant can force a partition of the land.¹³ Traditionally, however, the party seeking the partition must have a present possessory interest, either actual possession or the right to immediate possession of the property.¹⁴ Today, a number of states have enacted statutes which permit partition by co-owners of future interests.¹⁵

Whether a present possessory interest is required to partition land in Indiana was raised in *Bronson v. Bronson*.¹⁶ In *Bronson* the decree dissolving the marriage of Eleanor and Stephen Bronson provided that the family home was to be owned by the parties as tenants in common, but that Eleanor was to have exclusive possession of the home “until she remarries or does not occupy same as her principal residence, or until both parties agree to sell.”¹⁷ Subsequently, Stephen sought to partition the home. The trial court dismissed the petition and the plaintiff appealed.

On appeal, the court noted that while it is often stated that joint tenants and tenants in common have the right to partition property, either actual possession or the right to immediate possession is required.¹⁸ The Indiana statute governing the right to partition states only: “Any person holding lands as joint tenant or tenant in common, whether in his own right or as executor or trustee, may compel partition thereof”¹⁹ The cases interpreting this statute, however, have held that it was not intended to change the common law requirement that the party seeking the partition must have a possessory interest.²⁰ There is, however,

¹³J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 96 (2d ed. 1975); 4 G. THOMPSON, *REAL PROPERTY* § 1822 (1979 Replacement). A tenancy by the entirety cannot be partitioned without the consent of both parties since neither owns an individual share.

¹⁴2 R. POWELL, *REAL PROPERTY* § 289 n.8 (P. Rohan rev. ed. 1968); 4 G. THOMPSON, *supra* note 13, at § 1823.

¹⁵2 R. POWELL, *supra* note 14, at § 290.

¹⁶448 N.E.2d 1231 (Ind. Ct. App. 1983).

¹⁷*Id.* at 1232 (quoting the property settlement agreement).

¹⁸*Id.* at 1233.

¹⁹IND. CODE § 32-4-5-1 (1982).

²⁰*Schori v. Stephens*, 62 Ind. 441 (1878); *Godfrey v. Godfrey*, 17 Ind. 6 (1861); *Hurwich v. Zoss*, 170 Ind. App. 542, 353 N.E.2d 549 (1976); *Brunner v. Tevman*, 150 Ind. App. 139, 275 N.E.2d 553 (1971). Cases decided both prior and subsequent to the adoption of this statute have held that in order to sustain an action for partition, either legal or equitable title and the right to possession must be in the party maintaining the action. *Mclure v. Raber*, 106 Ind. App. 359, 19 N.E.2d 891 (1939); *Weaver v. Gray*, 37 Ind. App. 35, 76 N.E. 795 (1906).

as the court noted, one exception to the rule. Indiana Code, section 32-4-6-1 provides that a remainderman may force a partition of the land where one of the remaindermen also has a life estate in this land. If the decree were interpreted as giving Eleanor a life estate and Eleanor and Stephen the remainder, then a partition might have been possible. In his brief, however, Stephen conceded that the decree did not create a life estate in Eleanor.²¹ Perhaps the appellants were too quick to concede that Eleanor's interest was not a life estate. While it is difficult to put a label on the estate created by the divorce decree, the language that Eleanor can live in the house "until she remarries or does not occupy same as her principal residence" is not unlike the language used to create a life estate determinable.²² Another point which the court failed to consider is that if the interest is not a life estate, then the only alternative under traditional property law is a nonfreehold estate. In such a case, there is considerable authority that the co-owners of the reversionary interest following a nonfreehold estate may in fact partition their interest subject to the nonfreehold interest because seizing is in the reversion.²³ Yet even if the court had considered the issue and determined that the divorce decree created a life estate determinable in Eleanor, the court still might have refused to apply the statute allowing partition where one tenant in common also owns a life estate. Most likely, the court would have concluded from the language requiring both parties to agree to a sale prior to the happening of one of the conditions terminating Eleanor's right to possession that the property settlement incorporated into the divorce decree created an agreement not to partition. While co-tenants generally have the right to partition, courts recognize the right of the parties to agree not to partition, provided the agreement is reasonable.²⁴ Thus the court might well have reached the same result even if they had found Eleanor's interest to be a life estate.

C. Deeds

1. *Deed in Escrow to be Delivered at Grantor's Death.*—One of the essential elements necessary to convey property by deed is a valid delivery. It is very common in gifts of land to deliver the deed to a third party with instructions to deliver the deed to the grantee at some future time, often the death of the grantor.²⁵ Such a delivery is valid and effective

²¹Appellants' Brief at 15, *Bronson*, 448 N.E.2d at 1233 n.1.

²²R. CUNNINGHAM, W. STOEBUCH, & D. WHITMAN, *THE LAW OF PROPERTY* 73 (1984) [hereinafter cited as R. CUNNINGHAM]. Clearly, the interest of Eleanor could potentially have lasted for her lifetime if she did not remarry or cease to use the house as her principal residence.

²³4 G. THOMPSON, *supra* note 13, § 1826.

²⁴J. CRIBBET, *supra* note 13, at 106; R. CUNNINGHAM, *supra* note 22, at 231-32.

²⁵Practically all states recognize that an effective delivery may be made to a third party with directions to hold the deed and deliver it to the grantee at the grantor's death. 23 AM. JUR. 2D *Deeds* § 144 (1983).

to transfer title to the grantee, provided the grantor intends the physical transfer of the deed to the third party to pass title to the grantee immediately²⁶ and the grantor retains no dominion and control over the deed or any right to recall it.²⁷ The fact that the deed is held by the agent until after the grantor's death does not affect the validity of the deed.²⁸ The courts treat the deed as passing a present interest when the deed is delivered to the escrow with the enjoyment postponed until the death of the grantor.²⁹ The use of the donative escrow in Indiana has been somewhat complicated by the use of the "relation doctrine."³⁰ This doctrine has been used extensively in commercial escrows where the deed is not delivered to the grantee until the conditions of the escrow agreement have been complied with. Until such compliance, title remains in the grantor and the escrow has no authority to deliver the deed to the grantee.³¹ If circumstances change during the escrow period it is often necessary to resort to the use of the relation back theory to pass title to the grantee. For example, if the grantor dies before the escrow conditions are met, it may be necessary to use the doctrine of relation back for two reasons: (1) to avoid the grantor's spouse's claim to a dower interest or statutory share of the property, which would be the situation if the grantor still owned the property at the date of death; and (2) because there could be no delivery by the grantor after his death.³² Many courts do not use relation back in the case of a valid donative escrow because the grantor must relinquish all dominion and control over the deed at the time of delivery to the escrow agent, and the escrow agent becomes the agent of the grantee.³³ Thus, title passes at once to the grantee in the donative escrow, and there is no need to

²⁶*E.g.*, *Klingaman v. Burch*, 216 Ind. 695, 25 N.E.2d 996 (1940); *Spencer v. Robbins*, 106 Ind. 580, 5 N.E. 726 (1886); *Stevenson v. Nams*, 124 Ind. App. 358, 118 N.E.2d 368 (1954).

²⁷*E.g.*, *Dickason v. Dickason*, 219 Ind. 683, 40 N.E.2d 965 (1942); *St. Clair v. Marquell*, 161 Ind. 56, 67 N.E. 693 (1903); *Osborne v. Eslinger*, 155 Ind. 351, 58 N.E. 439 (1900); *Scott v. Scott*, 126 Ind. App. 3, 127 N.E.2d 110 (1955).

²⁸*See, e.g.*, 23 AM. JUR. 2D *Deeds* § 139 (1983); *Osborne v. Eslinger*, 155 Ind. 351, 58 N.E. 439 (1900); *Scott v. Scott*, 126 Ind. App. 3, 127 N.E.2d 110 (1955).

²⁹J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY*, 124-25 (2d ed. 1975); R. CUNNINGHAM, *supra* note 22, at 743; 8 G. THOMPSON, *REAL PROPERTY* § 4232 (1979 Replacement).

³⁰The doctrine is more commonly referred to as the doctrine of "relation back." Where the delivery is not completed when the deed is placed in the hands of the escrow, problems are presented when the escrow subsequently delivers to the grantee, since the grantor may have died or become incompetent before the second delivery. To avoid these and other problems the courts treat the delivery as relating back to the time of the first delivery from the grantor to the escrow. For an excellent discussion of the doctrine, see J. CRIBBET, *supra* note 29, at 185-86.

³¹*Id.* at 184-85; R. CUNNINGHAM, *supra* note 22, at 738-42.

³²J. CRIBBET, *supra* note 29, at 185 (citing *Bucher v. Young*, 94 Ind. App. 586, 158 N.E. 581 (1927)).

³³23 AM. JUR. 2D *Deeds* § 149 (1983).

use relation back.³⁴ Nevertheless, the Indiana courts do use the doctrine of relation back in the donative escrow situation, under the theory that the gift is not complete until accepted by the donee and thus relation back is necessary to pass title at the time of the delivery to the escrow agent.³⁵ *Russell v. Walz*³⁶ is a classic example of why this area of the law is a source of confusion and litigation.

In *Russell*, Anton Walz (Anton) made an antenuptial agreement in which his second wife, Dorothy, agreed to accept one-third of Anton's net estate in full settlement of all claims against his estate. Five years after this marriage took place, Anton conveyed a one seventy-fifth interest in one of his farms, known as "Coldwater Farm," to each of his seven children. He repeated this action three months later, and six months after that, while in the Mayo Clinic and under some apprehension of death, he conveyed a one-seventh of his remaining interest in the farm to each of his seven children. At this point Dorothy became concerned that Anton might continue transferring his property to his children and "intimated" the possibility of a divorce unless some suitable agreement could be reached. The Walzes met with an attorney, and made a compromise whereby Anton conveyed to Dorothy a one-third interest in another farm. The deed was left in escrow with the attorney, to be delivered to Dorothy upon the first of two events: written authorization from Anton's attorney, or Anton's death.³⁷

At this meeting Anton learned, to his surprise, that his children could evict him from the farm he had conveyed to them. A short time later, four of his children executed quitclaim deeds conveying back to Anton most of their interest in the farm. Shortly after that, Anton deposited with his attorney a warranty deed conveying all his interest in the farm to the four children who had conveyed back their interest. The attorney was authorized to deliver the deed to the children upon the first of the following two events: written authorization from Anton to his attorney, or upon the death of Anton.³⁸ On the same day Anton signed his will which made reference to this deed. The will stated that "in no event shall any portion of my said Coldwater Road farm go to satisfy [Dorothy's 1/3 interest in the estate]" and expressed his "intent to give said above described farm on Coldwater Road near Fort

³⁴J. CRIBBET, *supra* note 29, at 124-25; R. CUNNINGHAM, *supra* note 22, at 743; 8 G. THOMPSON, *supra* note 29, at § 4232.

³⁵See, e.g., *Osborne v. Eslinger*, 155 Ind. 351, 58 N.E. 439 (1900); *Scott v. Scott*, 126 Ind. App. 3, 127 N.E.2d 110 (1955); *Kokomo Trust Co. v. Hiler*, 67 Ind. App. 611, 116 N.E. 332 (1917).

³⁶458 N.E.2d 1172 (Ind. Ct. App. 1984). For a further discussion of this case, see Falender & Fruehwald, *Trusts and Decedents' Estates, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 435, 438-40 (1984).

³⁷*Id.* at 1175.

³⁸The provision actually reads, "upon the first of the following two events to occur: written authorization from my attorney, John H. Logan, . . . or on my death." *Id.* at

Wayne, Indiana to my children.”³⁹ After Anton’s death, two of his children were appointed coexecutors of his estate. The estate received two offers to purchase the Coldwater Farm. Norbert, “[a]cting for the estate,” agreed to sell the farm to Russell, who deposited \$20,000 earnest money.⁴⁰ The contract for sale, made with the seven adult children of Anton Walz, contained a provision that the seller was to furnish an abstract of title showing marketable title in the seller. When Russell’s attorney examined the abstract, he became concerned due to the “testamentary nature” of the escrow letter from Anton to his attorney and the reference in the will to the antenuptial agreement with Dorothy. Russell’s attorney requested a quitclaim deed and other documents from Dorothy and the personal representative of Anton’s estate. Because Dorothy refused to sign an affidavit declaring that she had no interest in the property, Russell declined to go through with the closing and requested a return of her earnest money deposit. When the money was not returned, Russell filed suit for the return of the money with interest, claiming the children did not have marketable title to the Coldwater Farm. The trial court found for the children, and Russell appealed.⁴¹

The issue presented on appeal was whether or not Dorothy had a potential claim to the Coldwater Farm which would render the children’s title unmarketable.⁴² The court noted that to be marketable

a title must be free from reasonable doubt, and such that a reasonably prudent person, with full knowledge of the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.⁴³

1176 (quoting the escrow letter). The wording appears to have been taken from the letter to Miller creating the escrow for Dorothy, which contains the identical language. *Id.* In the Miller letter the written authorization from Anton’s attorney would in fact be authorization from Anton himself, but in the letter to Logan establishing the escrow for the children, why would Logan need written authorization from himself? It reads as if Logan can accelerate the delivery. The court, however, concluded that “[Anton] Walz retained the capacity to accelerate delivery by instructing his attorney to deliver the deed before Walz’ death.” *Id.* at 1182.

³⁹*Id.* at 1176 (quoting Anton Walz’ will).

⁴⁰*Id.* at 1177. The fact that the co-executor of Anton’s estate was negotiating the sale of the Coldwater Farm indicates that some, if not all, of the children were treating the portion of the farm reconveyed to Anton as an asset of the estate. If the September 5, 1980 deed was effective as an inter vivos transfer, the farm would not be part of the estate and Norbert Walz should not have entered into the agreement to sell the farm in his capacity as executor of the estate.

⁴¹*Id.* at 1177-78.

⁴²*Id.* at 1178. The only other issue raised was whether or not there were Indiana inheritance and federal estate tax liens which rendered the title unmarketable. Because the court reversed on the first issue, it did not address this issue. *Id.* at 1178 n.1.

⁴³*Id.* at 1178 (quoting *Kenefick v. Schumaker*, 64 Ind. App. 552, 563, 116 N.E. 319, 323 (1917)).

The court observed that Dorothy's potential claim must be based upon her antenuptial agreement, since she had surrendered her statutory election to take against the will.⁴⁴ In order for such a claim to be a cloud on the title, the court concluded, the "farm must have been either a part of Anton Walz' net estate or the object of a fraudulent inter vivos transfer designed to remove the farm from that estate and evade Dorothy Walz' rights under the antenuptial agreement."⁴⁵

The court first sought to determine whether or not the farm was still part of the estate. If the deed passed no interest until the death of the grantor, it would be testamentary and part of Anton's estate. If, on the other hand, the deed passed an interest to the grantee during the grantor's lifetime, it was effective as an inter vivos conveyance and the property was removed "from Anton Walz' net estate, leaving Dorothy Walz with no claim to the farm under the terms of the antenuptial agreement."⁴⁶ In discussing this point, the court gave considerable weight to the fact that Anton, after discovering that his children could evict him from the Coldwater Farm after he had conveyed it to them, had four of the children reconvey a portion of their interest back to him. This, the court suggested, created "a reasonable inference" that Anton did not intend to divest himself of control over the property: "else why require that this interest be returned to be re-assigned?"⁴⁷ The answer seems rather obvious. In the earlier conveyance to his children, Anton had not retained a life estate which would have allowed him to remain on the property and collect the rents. No doubt the establishment of the escrow, whereby an undivided one-third interest in Anton's other farm would be held for Dorothy until Anton's death, suggested to Anton a way in which he could convey his interest in his Coldwater Farm to his children and still retain the use and enjoyment of the property until his death. It is not surprising, then, that a short time later he had the children reconvey their interests so that he might set up a similar escrow arrangement for the Coldwater Farm. The fact that the deed was not to be delivered to the children until Anton's death did not make the transfer testamentary. Placing a deed in escrow to be delivered at the grantor's death has the effect of creating a life estate in the grantor and immediately passing the remainder to the grantee.⁴⁸

⁴⁴458 N.E.2d at 1179.

⁴⁵*Id.* at 1180 (citation omitted).

⁴⁶*Id.* at 1181.

⁴⁷*Id.* at 1182.

⁴⁸23 AM. JUR. 2D *Deeds* § 149 (1983); J. CRIBBET, *supra* note 29, at 124-25. For simplicity, scholars and jurists often describe the interest retained by the grantor as a life estate. Technically, it is more correct to say that the deed creates an executory limitation in the grantee and that the fee remains in the grantor until his death, at which time title springs up in the grantee by operation of the deed. R. CUNNINGHAM, *supra* note 22, at 743; 8 G. THOMPSON, *supra* note 29, at § 4232.

The court also found that the use of Anton's own attorney as the escrow agent was an indication that he had not relinquished dominion and control over the deed.⁴⁹ In order to be an effective delivery, the donative escrow must be the agent of the grantee and not the agent of the grantor.⁵⁰ If the agent is in fact the agent of the grantor, his authority ends with the grantor's death and there can be no subsequent delivery.⁵¹ Courts have found, on occasion, that there was no delivery where the deed was placed in the hands of the grantor's attorney as the escrow agent.⁵² Where there was no right to recall the deed, however, most courts allow the grantor's own attorney to act as an escrow agent for the donee since the grantor has no control over the deed.⁵³ In the case at bar the court implied that the grantor retained control over the deed because "the question arises as to whether the deed might have been recalled had Walz so chosen."⁵⁴ There is nothing in the facts to suggest that the grantor had an express right to recall the deed. Nevertheless, the court seems to have believed that because the grantor retained the right to accelerate delivery of the deed, he had not relinquished all dominion and control over the deed.⁵⁵

A final factor which the court found indicated that the deed was not intended to pass any interest in the Coldwater Farm until after Anton's death was the wording of Anton's will, executed on the same day that the deed to the Coldwater Farm was deposited with Anton's attorney. The will, after mentioning the antenuptial agreement with Dorothy, declared: "but in no event shall any portion of my said Coldwater Farm go to satisfy said obligation."⁵⁶ If Anton had already conveyed the property to his children by deed, then the property was no longer part of the estate, and there was no need for the directive

⁴⁹458 N.E.2d at 1182-83.

⁵⁰23 AM. JUR. 2D *Deeds* § 146 (1983).

⁵¹*Grant Trust & Sav. Co. v. Tucker*, 49 Ind. App. 345, 96 N.E. 487 (1911).

⁵²*E.g.*, *Bickford v. Mattocks*, 95 Me. 547, 50 A. 894 (1901); *Gilmer v. Anderson*, 34 Mich. App. 6, 190 N.W.2d 708 (1971); *Bull v. Fenich*, 34 Wash. App. 435, 661 P.2d 1012 (1983).

⁵³*E.g.*, *Hodges v. Lockhead*, 217 Cal. App. 2d 199, 31 Cal. Rptr. 879 (1963); *Van Epps v. Arbuckle*, 332 Ill. 551, 164 N.E. 1 (1928); *Huxley v. Liess*, 226 Iowa 819, 285 N.W. 216 (1939); *Osten-Sacken v. Steiner*, 356 Mich. 468, 97 N.W.2d 37 (1959); *Cappozzella v. Cappozzella*, 213 Va. 820, 196 S.E.2d 67 (1973).

⁵⁴458 N.E.2d at 1183.

⁵⁵The court seems to imply that because "Walz retained the capacity to accelerate delivery by instructing his attorney to deliver the deed before Walz' death . . ." *id.* at 1182, the directive was somehow less certain than the directive contained in the *Loesch* case that the bank "shall deliver" the deeds at the grantor's death. *Id.* at 1183. In reality, the delivery was not uncertain, because if the grantor had not authorized the agent to deliver before his death, the second event under which the attorney was to deliver the deed, the death of the grantor, would have occurred.

⁵⁶*Id.* at 1183 (quoting Anton Walz' will).

in the will. The court went to great lengths to distinguish *Wheeler v. Loesch*.⁵⁷ In *Loesch*, the court found that two deeds delivered to the bank to hold until the grantor's death effectively passed title to the property to the grantor's children. The deeds were delivered to the bank on the same day that the grantor executed his will, and the will referred to the deeds.⁵⁸ The *Russell* court found that *Loesch* was not controlling since the words in Loesch's will, "'I have this day deeded to my son Peter . . . and to my son, John, two tracts of land'" expressed a *fait accompli*, whereas the words in Anton's will are ambiguous.⁵⁹ In light of the above, and the fact that Dorothy refused to sign the release, the court concluded that there was "a threat of litigation sufficient to render title to Coldwater Farm unmarketable."⁶⁰

The Walz children argued that the deed should be considered a valid *intervivos* transfer because of the doctrine of relation back. The court responded to this argument by pointing out that "relation back" can only be used where there is a valid delivery of the deed, and here there was a litigable issue concerning delivery.⁶¹ At this point the court could have, and perhaps should have, stopped. Instead, the court went on to indicate a second reason why the doctrine of relation back might not apply. The court observed that the doctrine of relation back has been held not to apply so as to affect the claims of creditors, and that Dorothy might be a creditor of her husband's estate.⁶² The court then elaborated on the status of the spouse as a creditor in its creation of a subissue as to whether, assuming *arguendo* that the deed was effective as an *inter vivos* transfer, the "transfer was voidable as a fraudulent transfer designed to remove property from Anton Walz' net estate and

⁵⁷51 Ind. App. 262, 99 N.E. 502 (1912).

⁵⁸The court in *Loesch* noted:

Where a will and deeds are executed at the same time, it may be requisite to look at all the instruments in order to ascertain the testator's intention, but this alone will not prevent the deeds from passing title to the property described therein, or make them a part of the will.

Id. at 265, 99 N.E. at 502 (citation omitted).

⁵⁹458 N.E.2d at 1182 (quoting *Wheeler v. Loesch*, 51 Ind. App. 262, 263, 99 N.E. 502, 502 (1912) (quoting Jacob Loesch's will)).

⁶⁰458 N.E.2d at 1183.

⁶¹*Id.* at 1183-84.

⁶²*Id.* at 1184. It is clear from the authorities cited by the court that the doctrine of relation back will not be used to defeat the claims of creditors. Nevertheless, it is a major leap to conclude that Dorothy might be a creditor. There are several older decisions suggesting that relation back can be used to defeat the wife's claim to a dower interest in property conveyed by donative escrow. *Smiley v. Smiley*, 114 Ind. 258, 16 N.E. 585 (1887); *Bucher v. Young*, 94 Ind. App. 586, 158 N.E. 581 (1927). Presently, the surviving spouse to an elective share of the estate of the deceased spouse is dependent upon the property being part of the estate and is not a vested interest in the property as was dower. See *infra* notes 69-71 and accompanying text.

thereby defeat Dorothy Walz' rights under her antenuptial agreement.”⁶³ To support this approach, the court cited *Dubin v. Wise*,⁶⁴ an Illinois decision which held that the husband could not intentionally dissipate his assets in order to defeat the wife's antenuptial rights.

According to *Dubin*, the inter vivos transaction can be attacked on two grounds: (1) actual intent to subvert the antenuptial agreement; or (2) fraud implied from the disproportionate and unreasonable amount of the assets transferred in relation to the balance of the promisor's property.⁶⁵ The court concluded that an argument based on *Dubin* would raise a litigable issue as to the validity of the inter vivos transaction.⁶⁶ By raising the issue of the spouse's status as a creditor for purposes of relation back and by suggesting that the deed could be set aside even if it were effective to convey the property inter vivos, the court has opened Pandora's box. This portion of the decision appears to be in conflict with the spirit if not the letter of *Leazenby v. Clinton County Bank*.⁶⁷ In *Leazenby*, the spouse transferred most of her assets into an inter vivos trust over which she retained the right to the income for life, control over the actions of the trustee, and a power to revoke or amend the trust.⁶⁸ In rejecting the claim of the surviving spouse to any share of the trust property, the Indiana Court of Appeals remarked: “This election interest is not absolutely vested as was the ancient dower interest; it is only an expectant interest, determined at the time of death, and dependent upon the contingency that the property to which the interest attaches becomes part of the decedent's estate.”⁶⁹ In rejecting the view that it was a fraud on the marital rights of the spouse, the court in *Leazenby* observed that because the spouse “had no right or interest in the property of his deceased wife during her lifetime, a valid trust agreement could not be fraudulent, actually or constructively, as to her. ‘One cannot be defrauded of that to which he has no right.’”⁷⁰ The *Leazenby* court emphasized the public policy considerations favoring free alienability of property inter vivos: “It is no argument that because one cannot by testamentary disposition exclude a spouse's elective share, that one cannot accomplish the same result by a valid trust agreement.”⁷¹ It is true that in *Leazenby* there was no antenuptial agreement, only the right of a spouse to an elective share of the estate. Nevertheless, it

⁶³458 N.E.2d at 1184.

⁶⁴41 Ill. App. 3d 132, 354 N.E.2d 403 (1976).

⁶⁵*Id.* at 138, 354 N.E.2d at 408-09.

⁶⁶458 N.E.2d at 1185.

⁶⁷171 Ind. App. 243, 355 N.E.2d 861 (1976).

⁶⁸*Id.* at 245, 355 N.E.2d at 862.

⁶⁹*Id.* at 247, 355 N.E.2d at 863 (citations omitted).

⁷⁰*Id.* at 251, 355 N.E.2d at 865 (quoting in part *Cherniack v. Home National Bank & Trust Company of Meriden*, 151 Conn. 367, 369, 198 A.2d 58, 60 (1964)).

⁷¹171 Ind. App. at 254, 355 N.E.2d at 867 (citation omitted).

is hard to see how a "waiver" of the elective share and an agreement to take a different share of the estate could give the spouse a greater right than the elective share itself. In *Russell*, the court has reopened the question of the rights of a surviving spouse to the assets of the deceased spouse transferred by inter vivos conveyances.⁷²

In light of this decision, there may be two alternatives to the use of the donative escrow to transfer property. The first alternative would be to place the condition in the deed rather than in the delivery by reserving a life estate property in the deed or stating in the deed that it is not to operate as a conveyance until the death of the grantor, and deliver the deed directly and at once to the grantee.⁷³ Thus, the grantor has the life estate or right to the rents and profits from the land, and the grantee has the remainder. There is no need for an escrow agent or use of the doctrine of relation back. The second alternative is the use of an inter vivos trust. Under the Indiana trust code, the settlor (grantor) can retain the right to the rents and profits or use of the property for life, as well as the power to revoke or amend the trust without the trust being considered testamentary.⁷⁴ There appears to be no reason, other than historical, why the grantor-donor cannot exercise any control over the property or recall the deed in a donative escrow, but the settlor of a modern inter vivos trust can exercise control over the operation of the trust and reserve the power to revoke or amend the trust. Nevertheless, the trust seems to avoid many of the problems encountered by the use of the donative escrow and should be given serious consideration as an alternative method of transferring property.

2. Construction of Deed's Language: Conveyance of Right of Way as Easement.—In *Richard S. Brunt Trust v. Plantz*,⁷⁵ the Indiana Court of Appeals determined that certain deeds granting a right of way over five parcels of land to the Terre Haute and Logansport Railroad (railroad)

⁷²For an excellent discussion of the rights of the surviving spouse in the property of the deceased spouse and the impact of the *Leazenby* decision, see Falender, *Protective Provisions for Surviving Spouses in Indiana: Consideration for a Legislative Response to Leazenby*, 11 IND. L. REV. 755 (1978).

⁷³See, e.g., *Kelley v. Simer*, 152 Ind. 290, 53 N.E. 233 (1899) (deed valid even though grantor reserved life estate); *Wilson v. Carrico*, 140 Ind. 533, 40 N.E. 50 (1895) (executed and recorded deed containing provision that "above obligation to be of none effect until after the death" of grantor held valid to pass future interest immediately to grantee even though enjoyment postponed until death of grantor); *Cates v. Cates*, 135 Ind. 272, 34 N.E. 957 (1893) (deed held valid even though grantor expressly reserved and excepted from the grant the use, occupation, rents, and proceeds to himself during his natural life).

⁷⁴The Indiana Probate Code provides that inter vivos trusts need not be executed with the formalities of a testamentary instrument even though the settlor retains the power to revoke or amend the power to control investments, or the power to consume the principal. IND. CODE § 29-1-5-9 (1982). See also *Leazenby v. Clinton County Bank*, 171 Ind. App. 243, 252, 355 N.E.2d 861, 864 (1976).

⁷⁵458 N.E.2d 251 (Ind. Ct. App. 1983).

in the late 1800's conveyed an easement only and not a fee to the right of way area. The right of way was subsequently conveyed to the Penn Central Corporation who, after it had abandoned railroad operations over the right of way, sold the right of way to the Richard S. Brunt Trust (Brunt). Brunt filed this action to recover damages and to enjoin neighboring landowners from cutting trees on the right of way. The landowners counterclaimed that the abandonment of railroad operations extinguished the easement and gave them the unrestricted fee simple title to the right of way area abutting their land. The trial court found for the landowners.⁷⁶

On appeal, Brunt contended that the deeds conveyed the fee to the right of way area and that the title was not lost by the abandonment of railroad operations. All but one of the conveyances were on a preprinted form supplied by the railroad entitled "Release of Right of Way." The form deeds provided that the grantors released and quit-claimed "the right of way, for railroad purposes only, . . . [a] strip of ground" through the grantors' property.⁷⁷ Brunt argued that the phrase "the right of way for railroad purposes only" was a covenant which was satisfied by the use of the property for railroad purposes for ninety years.⁷⁸ The court did not agree, stating that a conveyance of a "right" usually conveys an easement, whereas a conveyance of the land without any statement as to the use or purpose for which it is conveyed passes the fee to the land.⁷⁹

The court noted that in the past it had looked to a railroad's charter to determine whether a fee simple or a lesser estate was conveyed by the deeds, but observed that in this case the railroad's charter did not provide for the nature of the estate to be conveyed.⁸⁰ The court then examined the railroad's statutory authority to acquire land in 1881 and found that the corporation could purchase land "in fee simple or otherwise, as the parties may agree."⁸¹ Earlier decisions interpreting this language found that just because they could have acquired a fee does not mean that they took such an estate since the parties could have contracted for a lesser estate than the law allowed. Here, the granting clause clearly stated a right of way was conveyed, which under Indiana law passes an easement and not the fee. The court also noted that nominal consideration or consideration which is simply the benefit to be derived by the grantor from the construction of the railroad suggests an easement. The consideration for the right of way stated in the

⁷⁶*Id.* at 252.

⁷⁷*Id.* at 253 (quoting the Release of Right of Way agreement).

⁷⁸*Id.* at 252.

⁷⁹*Id.* at 253.

⁸⁰*Id.* at 252 n.2.

⁸¹*Id.* at 254 (quoting the authorizing statute) (court's emphasis omitted).

preprinted form was “the advantages which will accrue to me in particular and the public generally by the construction of a railroad.”⁸² Perhaps as important as any other rationale for the decision was the court’s remark that “we do not wish to encourage parceling of land in narrow strips which runs [sic] randomly over Indiana land by reaching any other conclusion.”⁸³

Finally, the court addressed the one conveyance which was not on a preprinted form. This handwritten conveyance read much more like a conveyance of the land itself than a right of way: “[the grantors] convey and quit claim . . . for railroad purposes . . . the following real estate”⁸⁴ In rejecting the argument that a fee was conveyed, the court noted that there would have been no reason to state the purpose for which the land was to be used in the deed if it were conveying a fee simple. The court also observed that the surrounding circumstances demonstrated that the parties did not intend to convey a fee. The railroad had earlier acquired an easement over another section of the grantors’ land; there was no reason to believe a greater interest was desired in the second transaction, and the grantors would have had no reason to believe a different interest was being conveyed.⁸⁵ Having concluded that only an easement was conveyed to the railroad by the right of way deeds, the court held the unrestricted fee simple reverted to the present landowners when Penn Central abandoned the railroad operations.⁸⁶

D. Easements and Restrictive Covenants

1. *Easements*.⁸⁷—Easements, like other interests in land, can be owned in common by two or more persons. The rights and obligations of such co-owners were discussed in *Litzelswope v. Mitchell*.⁸⁸ The Litzelswopes, Andersons, and Mitchells each acquired a common right of way easement for ingress and egress to and from their lots to a public roadway. While

⁸²*Id.* at 252-53 (quoting the Release of Right of Way agreement).

⁸³*Id.* at 255 n.3.

⁸⁴*Id.* at 255.

⁸⁵*Id.* at 256. In a concurring opinion, Judge Garrard agreed that the preprinted form deeds conveyed only an easement, but found it unnecessary to determine the estate conveyed by the handwritten deed because the appellant waived the issue by presenting only one argument on the deeds. *Id.* (Garrard, J., concurring).

⁸⁶*Id.*

⁸⁷In this survey period there were two cases dealing with easements which are not discussed in this Article: *Hagemer v. Indiana & Michigan Elec. Co.*, 457 N.E.2d 590 (Ind. Ct. App. 1983) (power company’s complaint for an easement insufficient to comply with Indiana’s eminent domain statute. IND. CODE § 32-11-1-2 (1982)); *Rees v. Panhandle Eastern Pipe Line Co.*, 452 N.E.2d 405 (Ind. Ct. App. 1983) (court upheld a trial court’s determination of the width of a pipeline easement).

⁸⁸451 N.E.2d 366 (Ind. Ct. App. 1983).

the easement was sixty feet wide, only a portion approximately twenty feet wide was used as a roadway. In order to construct a driveway across an open ditch running along the side of the easement, the Mitchells placed a culvert in the ditch and covered it with dirt; they also installed a railroad tie retaining wall east of the open ditch. Two years later, the Mitchells built a garage on their property, poured excess concrete into the bottom of the open ditch, and built wooden steps from their property to the driveway. The following year they installed bricks in the steps, extended the culvert to a catch basin which they installed in the untraveled portion of the roadway, covered the ditch with dirt, and seeded it. The driveway, retaining wall, steps, culvert and ditch were all within the easement, but outside the traveled portion.⁸⁹

After these improvements were made, the Litzelswopes and Mitchells jointly commissioned a survey, which revealed that the improvements extended into the easement. The Litzelswopes and Andersons filed suit to compel the Mitchells to remove their encroachments from the easement.⁹⁰ The trial court enjoined the Mitchells from making any additional encroachments or from changing the character of the existing encroachments, such as by paving the driveway, but allowed them to keep the existing encroachments and to repair and maintain them.⁹¹ The judgment further provided that the Mitchells should not acquire any prescriptive rights to the encroachments, and that if the easement should later be accepted as a public roadway and the appropriate agency so required, the Mitchells must remove the encroachments at their own expense.⁹²

The court of appeals observed that the owner of an easement possesses all rights necessary and incidental to the use and enjoyment of the easement, and may make the repairs, improvements, and alterations reasonably necessary to make the grant of the easement effectual. While noting that the controversy in such situations normally arose between the dominant and servient owners, the court saw no reason why the same rules should not apply in disputes between co-owners of the easement. Where there are several owners, however, each owner may exercise such rights only so long as they do not hurt the rights of co-owners.⁹³ In other words, the owner in common of an easement “may not alter the land in such a manner as to render the easement appreciably less convenient and useful for one of his co-owners.”⁹⁴

The court examined the encroachments made by the Mitchells to see if they were reasonably necessary to their use of the easement. The

⁸⁹*Id.* at 368.

⁹⁰*Id.* at 367.

⁹¹*Id.* at 368-69.

⁹²*Id.* at 369.

⁹³*Id.*

⁹⁴*Id.* at 370 (citations omitted).

court found the driveway was necessary to their use of the easement so as to provide access to and from the garage to the traveled portion of the easement, and that the culvert was necessary to construct the driveway across the open ditch. Likewise, the steps were necessary to provide ingress to and egress from their property. Finally, the court found that the railroad tie retaining wall, the culvert, drain pipe, catch basin, and concrete poured into the ditch were all necessary to alleviate an erosion problem which had been worsening. Having found that the encroachments were reasonably necessary for the use and enjoyment of the easement, the court then considered whether or not they were an unreasonable interference with the Litzelswope's use and enjoyment of the easement. The only claim of interference made by the Litzelswope's was that the catch basin required them to veer slightly to the left when approaching the easement from the roadway, a question of fact which the trial court decided against the defendants.⁹⁵

2. *Restrictive Covenants*.—Unlike easements, restrictive covenants are enforced in equity, and a court of equity will not enforce a restrictive covenant where conditions in the restricted area have changed to such an extent that they have significantly reduced or eliminated any benefits sought to be realized by enforcement of the covenant.⁹⁶ The issue of what constitutes "changed conditions" sufficient to deny enforcement of a restrictive covenant was raised in *Burnett v. Heckelman*.⁹⁷ In 1955, the plaintiff, Mary Heckelman, her husband, and his parents purchased five lots in a subdivision, intending to build houses on them. Restrictive covenants prohibited the owners of any of the subdivision lots from using them for commercial purposes. Since 1955, the area surrounding the subdivision had become commercialized. There were some fifty commercial establishments in the immediate area, but within the subdivision there were neither commercial activities nor commercial structures.⁹⁸

In 1969, in order to widen a state highway, the state condemned as much as fifty feet of the nine lots facing the highway, including the five lots owned by the plaintiff. The four houses built on the other lots

⁹⁵*Id.* Another issue raised on appeal by the Mitchells was acquiescence. Mr. Litzelswope was aware of the construction of the driveway, gave advice to Mr. Mitchell concerning the construction of the steps, furnished the railroad ties for the retaining wall, and suggested that Mitchell pour the concrete into the bottom of the ditch to prevent further erosion. From these facts, the court concluded that the trial court might have determined that the failure to object to the encroachments amounted to an implied consent or acquiescence, but that, since the trial court had also found the acts of the Mitchells did not exceed their rights to the use of the easement, it was not necessary to decide this issue.

⁹⁶*Bob Layne Contractor, Inc. v. Buennagel*, 158 Ind. App. 43, 301 N.E.2d 671 (1973); 2 AMERICAN LAW OF PROPERTY § 9.39 (Supp. 1976). See also Krieger, *Property, 1981 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 459, 473 (1981).

⁹⁷456 N.E.2d 1094 (Ind. Ct. App. 1983).

⁹⁸*Id.* at 1096.

facing the highway had deteriorated. The plaintiff argued that these changes within the subdivision and the commercialization of the surrounding area had defeated the purpose of the covenant, making its enforcement inequitable.⁹⁹ Based on this evidence, the trial court modified the restrictive covenants pertaining to Heckelman's lots to permit her to use them for commercial activities, but ordered her to grant all the landowners in the subdivision a twenty foot easement across the rear portion of the lots, and to erect a fence and plant trees along the entire length of the easement so as to create a barrier between her property and the remainder of the subdivision. Dissatisfied with this arrangement, the remaining property owners were granted a stay of execution pending this appeal.¹⁰⁰

The court of appeals noted that, in order to declare the restrictive covenant unenforceable, the change in the subdivision and the surrounding area must be so great that the purpose of the covenants can no longer be attained. While no hard and fast rule can be developed to cover all situations, the court concluded that more weight should be given to changes within the subdivision itself.¹⁰¹

In refusing to give as much weight to changes in the area immediately outside the subdivision, the court was attempting to avoid a "domino effect." As the court observed, there will always be a line where commercial and residential areas meet, and the residential property at this boundary line will be less valuable for residential purposes.¹⁰² But to allow the lots along the line to become commercial would in turn create a new line where, once again, the owners of the lots along the line could make the argument that the property is less suited for residential purposes and more valuable for commercial activities. Thus, the line would continue moving into the interior of the residential area until all of the lots were affected.¹⁰³ In order to avoid this result, restrictive covenants should be enforced so long as they are still of benefit to the interior lots.¹⁰⁴ In this case, the court found that "there is no evidence [the] diminution in value [of the lots facing the highway] has altered the 'residential nature of life within' the subdivision."¹⁰⁵ The court noted

⁹⁹*Id.* at 1098. She also argued that the lots facing the highway would be more valuable if put to commercial use.

¹⁰⁰*Id.* at 1096.

¹⁰¹*Id.* at 1098 (citing *Cunningham v. Hiles*, 182 Ind. App. 511, 517, 395 N.E.2d 851, 855 (1979)).

¹⁰²456 N.E.2d at 1098.

¹⁰³The trial court attempted to avoid this effect by the creation of a buffer zone. 456 N.E.2d at 1096.

¹⁰⁴5 R. POWELL, *THE LAW OF REAL PROPERTY* 684 (1980); 2 *AMERICAN LAW OF PROPERTY*, *supra* note 96, at § 9.39.

¹⁰⁵456 N.E.2d at 1099 (quoting in part *Cunningham v. Hiles*, 182 Ind. App. 511, 518, 395 N.E.2d 851, 1979)) (*Cunningham* court's emphasis omitted).

the similarity of the issues raised in this case and those in *Cunningham v. Hiles*,¹⁰⁶ where a landowner in a residential subdivision was attempting to build a commercial structure on his lot.¹⁰⁶ In *Cunningham*, traffic had increased around the subdivision, commercial activities were in the immediate area, lots near the major thoroughfare failed to attract residential buyers, and an office building erected on adjoining land actually protruded more than 100 feet into the subdivision. Nevertheless, the *Cunningham* court concluded that these changes had not affected the residential nature of life within the subdivision, and enforced the restrictive covenants against the landowner.¹⁰⁷

In reversing the trial court's decision, the court of appeals was unsympathetic to the plaintiff's plight. She purchased with full knowledge of these restrictions, and to allow her now to disregard these covenants would be detrimental to the other owners who purchased their lots in reliance upon the restrictive covenant.¹⁰⁸ The *Burnett* decision points out once again that changed conditions sufficient to make a restrictive covenant unenforceable must be so radical in nature as to destroy the purpose of the restriction and neutralize its benefits.

E. Landlord-Tenant

During this survey period there were a number of interesting landlord-tenant cases. In *Keystone Square v. Marsh Supermarkets, Inc.*,¹⁰⁹ the court examined the rights and obligations of an "anchor tenant" under the provision of a shopping center lease. In this case, Marsh Supermarkets (Marsh) entered into a lease with the Keystone Shopping Center Company (Keystone) to operate a store in the Keystone Shopping Center. The lease provided for an annual rent plus one percent of the gross sales exceeding ten times the rent. Because of the store's success, Marsh attempted to renegotiate the lease and obtain additional floor space. These negotiations failed, and Marsh moved its store out of the shopping center to a new location near Keystone. The leased space in the shopping center was temporarily vacant and then reopened by Marsh as a Green Basket discount supermarket. Marsh filed for a declaratory judgment as to its rights and liabilities under the lease, and Keystone counter-claimed, alleging Marsh was in violation of the lease and guilty of fraud. The trial court entered a judgment for Marsh from which Keystone appealed.¹¹⁰

¹⁰⁶182 Ind. App. 511, 395 N.E.2d 851 (1979); see also Krieger, *supra* note 96, at 473 (extensively discussing the *Cunningham* case).

¹⁰⁷182 Ind. App. at 518-59, 395 N.E.2d at 855-56.

¹⁰⁸456 N.E.2d at 1099.

¹⁰⁹459 N.E.2d 420 (Ind. Ct. App. 1984).

¹¹⁰*Id.* at 423.

The court of appeals, following the trend of decisions in other jurisdictions, found that there was no implied covenant requiring Marsh to continue operating a supermarket on the leased premises.¹¹¹ It is difficult to see how Keystone could have made this argument when the lease itself specifically permitted Marsh to assign or sublet the leased premises.¹¹² Keystone also argued that Marsh had underpaid the rent by understating the amount of sales, and by taking certain setoffs and deductions from the rent not allowed under the lease. As to the setoffs and deductions, the court found that they were allowed under the language of the lease. Keystone argued, however, that the court should also consider "lease data summaries" which were in direct conflict with the clear and unambiguous language in the lease. The court rejected this position, concluding that while generally the courts should consider separate writings executed at the same time as a whole, this rule should not be applied arbitrarily without regard for the realities of each case.¹¹³ With regard to the understatement of the sales for 1976, the court noted that the lease provided that Keystone had to challenge any sales report within 120 days after it was submitted, and Keystone did not notify Marsh of its challenge until 1978.¹¹⁴ Keystone also argued that the trial court judgment should not be enforced because of changed circumstances. The court noted that a declaratory judgment only fixes the rights and obligations of the parties at the time of the trial, and that while the changed circumstances might give rise to another cause of action, they did not affect the trial court's judgment.¹¹⁵

In another shopping center case, *Tucker v. Richey*,¹¹⁶ the Indiana Court of Appeals and the Indiana Supreme Court both agreed that the provisions in a shopping center lease were clear and unambiguous, but reached opposite conclusions as to the meaning of the clear and unambiguous language.¹¹⁷ The lease between the landlord of a shopping

¹¹¹*Id.* at 423 (citing *Bastian v. Albertson's Inc.*, 102 Idaho 909, 643 P.2d 1079 (1982); *Williams v. Safeway Stores, Inc.*, 198 Kan. 331, 424 P.2d 541 (1967); *Stop & Shop, Inc. v. Gourm*, 347 Mass. 697, 200 N.E.2d 248 (1964); *Fuller Market Basket, Inc., v. Gillingham & Jones, Inc.*, 14 Wash. App. 128, 539 P.2d 868 (1975)).

¹¹²459 N.E.2d at 423.

¹¹³*Id.* at 425.

¹¹⁴*Id.*

¹¹⁵*Id.* at 425-26.

¹¹⁶448 N.E.2d 1206 (Ind. Ct. App. 1983), *vacated*, 460 N.E.2d 964 (Ind. 1984).

¹¹⁷The pertinent lease provisions are contained in paragraphs (1) and (15) of the lease. Paragraph (1) provides in part: "Landlord expressly reserves the right to change or modify the plans and facilities of the Shopping Center without the consent of the Tenant, but neither the Leased Premises nor the general character of the Shopping Center shall be changed without such consent." *Id.* at 1210-11 (quoting the lease agreement). Paragraph (15) reads in part:

Tenants shall not use the Mall Common Area or the Open Common Area for any display or storage of merchandise or use such areas in any way which

mall and the subtenants who operated an ice cream shop in the mall provided that the landlord reserved the right "to permit advertising displays, entertainment and educational displays, and events, and kiosks . . ."¹¹⁸ in the mall common area. The landlord allowed two kiosks to be erected in the mall common area near the ice cream store, and the subtenants complained. When the landlord did not have the kiosks removed, the subtenants filed suit for breach of the lease, and vacated the store.¹¹⁹

The trial court granted summary judgment for the subtenants without written findings of fact or conclusions of law.¹²⁰ The Indiana Court of Appeals found that the language in the lease was clear and unambiguous, and applied the "four corners rule": the express language found within the four corners of the lease, if unambiguous, determines the intent of the parties.¹²¹ The landlord argued that the lease provision clearly reserved the right to erect kiosks in the mall. The court of appeals did not agree, pointing out that words should "be construed consistently with reference to the whole clause in which they are used and that the clause in which "kiosks" is used refers to things which are all of a temporary nature.¹²² In addition, the court noted that the intent of the parties is determined from the language in the entire instrument. After examining the language in the lease, the court concluded that the trial court reasonably ascertained

would interfere with the use of such areas by other tenants, their employees and invitees, without the express written consent of Landlord and shall comply with all reasonable rules and regulations of Landlord with respect thereto. Landlord reserves the right to make charges (sic), additions, deletions, alterations, and improvements in and to such areas, and to permit advertising displays, entertainment, and educational displays and events, and kiosks thereon.

Id. at 1210.

¹¹⁸460 N.E.2d at 966 (quoting the lease agreement). "Kiosk" is defined as: "1. in Turkey and Persia, a summerhouse or pavilion of open construction 2. a somewhat similar small structure open at one or more sides, used as a newsstand, bandstand, entrance to a subway, etc." WEBSTER'S NEW WORLD DICTIONARY 777 (2d college ed. 1982), *quoted in*, *Tucker v. Richey*, 460 N.E.2d 964, 966 (Ind. 1984). The court also cited *City and County of Honolulu v. Ambler*, 1 Hawaii App. 589, 590, 623 P.2d 92, 93 (1981) for a judicial definition of "kiosk." That case defined "kiosk" "as a small structure used as a newsstand, entertainment booth or the like." 460 N.E.2d at 966 (citing the *Ambler* decision).

¹¹⁹The lease defined "mall common area" as being "the enclosed common area as shown on the plot plan . . . with heated and air conditioned mall areas, corridors, fixtures and restrooms" 460 N.E.2d at 965-66 (quoting the lease agreement).

¹²⁰*Id.* at 966. The Indiana Supreme Court concluded that, evidently, the judgment was based on a conclusion that (1) the lease only permitted temporary advertising, entertainment, and educational kiosks, or (2) the erection of permanent retail kiosks in the common mall area changed the general character of the mall. *Id.* at 966-67.

¹²¹448 N.E.2d at 1209.

¹²²*Id.* at 1210. *Noscitur a sociis* (one is known by his associates) is a rule of construction which limits or restricts the general meaning of a word by consideration of the accompanying words.

that the mall common area was to be open to all tenants, customers and invitees, and that the erection of a permanent kiosk would be prohibited. The court further concluded that “the general character” of a shopping mall is where retail stores face out onto an enclosed walkway system, containing rest benches, interior landscaping, and that erecting a retail kiosk would be altering this “general character” in violation of the lease without the consent of the tenant.¹²³ Judge Ratliff dissented, concluding that the language gave the landlord the right to erect kiosks subject only to the limitation that the general character of the mall not be changed. He concluded that anyone familiar with shopping malls was well aware that kiosks are not an unusual usage and are common attributes of such malls. Their construction would not change the “general character” of the mall.¹²⁴

The Indiana Supreme Court vacated the decision of the court of appeals, incorporating Judge Ratliff’s dissenting opinion verbatim into the majority opinion.¹²⁵ The court noted that the word “temporary” was not contained in the clause allowing the landlord to erect kiosks, and the word “kiosk” contemplates a structure of a permanent or at least semipermanent nature used for retail sales.¹²⁶ In a dissenting opinion, Justice DeBruler observed that the lease reserved the right of the landlord “to permit” the erection of kiosks and that the synonym for “permit” most favorable to the position of the landlord would be “license.” Clearly, a lease is more than a license. A license could not permit the landlord to take exclusive possession of a part of the mall common area “and receive[] consideration from retailers in return for their exclusive occupancy.”¹²⁷

In *Lafayette Realty Corp. v. Vonnegut’s Inc.*,¹²⁸ Vonnegut’s Inc. (Vonnegut’s) leased the premises it used as a hardware store from Lafayette Realty Corporation (Lafayette). The lease provided that Vonnegut’s should keep the heating system in repair, but that Lafayette should make any necessary capital replacements. The lease further provided that if Lafayette should default in the performance of any conditions in the lease, Vonnegut’s, at its option and after giving Lafayette thirty days written notice of such default, could make the repairs and deduct the cost of performance from the rent.¹²⁹ Another provision in the lease stated that its option remedies should not preclude either party from invoking any other remedy available to them by law.¹³⁰

¹²³*Id.* at 1211.

¹²⁴*Id.* at 1212 (Ratliff, J., dissenting).

¹²⁵460 N.E.2d at 967.

¹²⁶*Id.* at 966.

¹²⁷*Id.* at 967 (DeBruler, J., dissenting).

¹²⁸458 N.E.2d 689 (Ind. Ct. App. 1984).

¹²⁹*Id.* at 690-91.

¹³⁰*Id.* at 691.

A routine inspection of the store's heating plant led to the discovery that the heat exchanger had deteriorated, and Vonnegut's was advised not to use the system until the heat exchanger was replaced. Vonnegut's immediately notified Lafayette. Lafayette's maintenance employee and a private contractor inspected the heating plant at Lafayette's request; they advised Lafayette that the entire heating plant needed to be replaced.¹³¹ After several attempts to contact Lafayette's president, Vonnegut's reached Lafayette's vice president, who proposed that Lafayette would pay half of the cost if Vonnegut's agreed to pay the other half. Vonnegut's general manager verbally rejected this offer and confirmed the rejection by letter. There was no further communication between the parties until Vonnegut's notified Lafayette that it had vacated the premises a little over a month later. After installing a new heating system, Lafayette advised Vonnegut's that it would be expected to comply with the terms of the lease. When Vonnegut's refused to resume possession of the store, Lafayette sued for breach of the lease. Vonnegut's raised the affirmative defense of constructive eviction, and the trial court rendered judgment for Vonnegut's. Lafayette appealed.¹³²

The court of appeals concluded that Vonnegut's had been constructively evicted, based on evidence that temperatures in the store were at or near freezing for most of the month, forcing employees to wear winter clothing while at work, and that on several occasions the cold forced the store to close. The court found that this breach by the lessor was "'so substantial and permanent in character' as to effectively exclude the lessee from [the] beneficial use of the property."¹³³ The court noted that in order to assert the defense of constructive eviction the lessee must vacate the premises within a reasonable time or waive the defense, and what is a reasonable time can "only be made upon a consideration of the surrounding circumstances."¹³⁴ Under these circumstances, the court could not say the trial court was erroneous in determining that Vonnegut's had been constructively evicted.¹³⁵

Lafayette argued that because Vonnegut's had the right (option) to make capital replacements when Lafayette refused to make them, and the lease did not state what was to happen if Vonnegut's refused to

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.* at 692 (citation omitted). Not every minor breach of the lease will constitute a constructive eviction. The act or omission of the lessor must materially deprive the lessee of the beneficial use or enjoyment of the leased property before the lessee may elect to abandon the property and avoid further obligations under the lease. *Talbott v. Citizens National Bank of Evansville*, 389 F.2d 207 (7th Cir. 1968); *Talbott v. English*, 156 Ind. 299, 59 N.E. 857 (1901); *Sigsbee v. Swathwood*, 419 N.E.2d 789 (Ind. Ct. App. 1981).

¹³⁴458 N.E.2d at 693 (citation omitted).

¹³⁵*Id.* at 694.

make the replacements, there was an ambiguity in the lease and Vonnegut's was therefore required to give Lafayette thirty days notice if it chose not to make the capital replacement. The court found this argument absurd.¹³⁶ Vonnegut's had, in fact, exercised its option in the past and made major repairs to the store's air conditioning system and then deducted the cost from the rent, but the court reasoned that a prior exercise of its option did not require its exercise in all cases. The lease expressly stated that the specified option remedies did not preclude the invocation of any other remedy available to them by law. Since Vonnegut's could treat the failure to replace the heating system as a constructive eviction, the court of appeals affirmed the trial court's judgment.¹³⁷

In *Waxman Industries v. Trustco Development Co.*,¹³⁸ the court addressed a number of interesting and important issues, including mitigation of damages following abandonment by the tenant, acceptance of surrender by the landlord, and the determination of "reasonable attorney fees" which the tenant agreed to pay in the event of his default.¹³⁹ Trustco Development Company (Trustco) leased a storeroom in a shopping center to Handi-Fix Stores of Indiana, Inc. (Handi-Fix), and Wax-

¹³⁶*Id.* at 693.

¹³⁷*Id.* at 694.

¹³⁸455 N.E.2d 376 (Ind. Ct. App. 1983).

¹³⁹The issue of attorneys fees involved the lease provision that "upon default, 'Lessee shall pay all costs and reasonable attorney fees . . .'" *Id.* at 379 (quoting the lease). Trustco's attorney testified that there was a contingent fee agreement between himself and his client, and that in such cases it is normal to receive one third of the amount collected, and where he might be forced to go to Ohio to enforce the judgment, as here, the fee should be 40% of the judgment. The issue on appeal was whether or not the obligor, who under the terms of an instrument has agreed to pay reasonable attorney fees, is bound by the contingent fee contract between the obligee and his attorney. After concluding that this was a case of first impression in Indiana, the court examined contingent fee contracts in general. The court found that such arrangements are generally binding between the attorney and his client, although they must be carefully scrutinized by the courts to ensure that no improper advantage is taken by the attorney. The court also concluded that while no Indiana authority exists, a contingent fee can never be implied but must be a matter expressly contracted for between the attorney and client. It followed, said the court, that the contingent fee contract of the obligee on the instrument with his attorney could not be enforced against the obligor who had merely agreed to pay a reasonable attorney fee in the instrument. *Id.* at 381 (citing with approval *Olson v. Carter*, 175 Mont. 105, 572 P.2d 1238 (1977) (holding that the agreement between an attorney and his client is not controlling in fixing the reasonable attorney fee to assess against the opposing party); *Engebretson v. Putnam*, 174 Mont. 409, 571 P.2d 368 (1977). The *Engebretson* court suggested that a reasonable fee be determined in accordance with the guidelines enumerated in the Code of Professional Responsibility DR 2-106(B). 174 Mont. at 413, 571 P.2d at 372. The *Waxman* court reversed as to the attorney fees, and directed the trial court to fix a reasonable attorney fee which did not take into consideration the contingent fee contract between the attorney and his client. 455 N.E.2d at 382. As the court noted, the contingent fee would normally be a much higher fixed fee to the obligor and such an arrangement is susceptible to abuse. *Id.*

man Industries, Inc. (Waxman) guaranteed the lease. For some unexplained reason, Handi-Fix vacated the premises a little over a year after entering the lease. Handi-Fix's attempts to sublet the storeroom were unsuccessful and its last rental payment was made nine months later. A year and a half after that, and a little over a year before Handi-Fix's five year lease expired, Trustco found a new tenant and relet the premises for a term of three years, at a monthly rental \$325 over Handi-Fix's rent. Trustco then terminated Handi-Fix's lease, under a provision which provided that if the lessee defaulted in the payment of the rent, "Lessor may thereupon take possession . . . and re-let the same without such action being deemed an acceptance of a surrender of this lease . . . or the Lessor at its own option may . . . terminate this lease."¹⁴⁰ Trustco then brought suit against Handi-Fix for breach of the lease, seeking the unpaid rent, damages, and attorney fees. Handi-Fix counterclaimed, seeking credit for a shortage in the square footage of the lease premises¹⁴¹ and a credit for the additional rent per month from the new tenant for the remainder of the lease term.¹⁴²

With regard to the shortage in the square footage, the court noted that it was "de minimus" and Handi-Fix failed to show how it was damaged by this insignificant difference in the dimensions. In addition, the court found that Handi-Fix had waived any breach by accepting the defective performance.¹⁴³ A more complex issue was raised by Handi-Fix's argument that the additional rent received by Trustco from the new tenant for the remainder of the term of the original lease should be credited to it. When a tenant abandons the leased premises this does not automatically terminate the tenant's obligations under the lease. The landlord can treat the lease as continuing, in which case he may relet the premises and hold the tenant liable for the difference between the rent received from the new tenant and the rent due under the lease.¹⁴⁴ Where the rent from the new tenant is less than the rent reserved under the lease, the landlord must be careful not to do anything which might

¹⁴⁰455 N.E.2d at 378 (quoting the lease).

¹⁴¹Two months after the beginning of the lease, Handi-Fix informed Trustco of eight defects in the leased premises, including a very minor shortage in the size of the premises. The court noted that the lease did not state whether the distances referred to were inside or outside measurements. There is nothing in the facts to suggest that Handi-Fix was attempting to treat the minor shortage in space as a constructive eviction. *Id.* at 377.

¹⁴²*Id.* at 378.

¹⁴³*Id.* at 378-79. One month after making a complaint about the shortage, Handi-Fix executed a document entitled "Acceptance of the Premises," which waived any defects in the premises.

¹⁴⁴In Indiana, if the landlord wants to treat the lease as continuing and hold the tenant liable for the rent for the remainder of the term, he must mitigate his damages by making reasonable efforts to relet the premises. *Sigsbee v. Swathwood*, 419 N.E. 2d 789 (Ind. Ct. App. 1981); *State v. Boyle*, 168 Ind. App. 643, 344 N.E.2d 302 (1976); *Hirsch v. Merchants National Bank Co.* 166 Ind. App. 497, 336 N.E.2d 833 (1975).

suggest he is accepting the offer of surrender by the tenant.¹⁴⁵ Where the new rent is greater than the rent reserved under the lease, the landlord, as in this case, may decide to terminate the lease.¹⁴⁶

Handi-Fix apparently made two separate arguments on this issue. First, Handi-Fix contended that, although it had abandoned the premises, it had not surrendered the premises and that it never consented to the termination of the lease. The court found this argument made little sense in view of Handi-Fix's nonpayment of rent and the clause in the lease granting the lessor the option to terminate upon default.¹⁴⁷ Second, Handi-Fix argued that because the landlord did not elect to terminate the lease prior to reletting the premises, Trustco had elected not to terminate the lease.¹⁴⁸ Thus, Trustco could not hold Handi-Fix liable for the full rent for the months the premises were vacant and then exercise its option to terminate the lease when it was able to relet for a higher rent. Unfortunately for Handi-Fix, there is an earlier Indiana decision directly on point. In *Trick v. Eckhouse*,¹⁴⁹ the court stated: "The fact that the appellee [lessor] was able to rent the property at an increased rental is no reason why she should not recover the rent for the two months the building was vacant" ¹⁵⁰ Under this decision the landlord has the best of both worlds. If the tenant abandons the premises and the landlord, using reasonable efforts, is unable to relet the premises, or rents them for an amount less than the rent reserved in the lease, he may treat the lease as continuing, and hold the tenant liable for the difference between the rent received from the new tenant and the rent due under the lease. If, on the other hand, he is able to relet for a higher rent, he can terminate the lease upon reletting, and sue the tenant for the rent due and owing up to the time of the reletting

¹⁴⁵If the landlord accepts the offer to surrender, the lease comes to an end and, with it, the tenant's obligation to pay rent ends. *Paxton Realty Corp. v. Peaker*, 212 Ind. 480, 9 N.E.2d 96 (1937); *Grueninger Travel Service, Inc., v. Lake County Trust Co.*, 413 N.E.2d 1034 (Ind. App. 1980); *Donahoe v. Rich*, 2 Ind. App. 540, 28 N.E. 1001 (1891).

¹⁴⁶There appears to be general agreement that a tenant who abandons the premises is entitled to a rent credit for any proceeds gained by the landlord from reletting during the period of the original lease. *Wanderer v. Plainfield Carton Corp.*, 40 Ill. App. 3d 552, 351 N.E.2d 630 (1976). The court in *Waxman* at least implied that if this company had not terminated the lease, Handi-Fix would have been entitled to a credit for the excess rent received from the new tenant. 455 N.E.2d at 379. However, even if the landlord had not terminated the lease, it is very unlikely that a court would require the landlord to return any of the excess rent over and above unpaid rent and damages to the tenant. *Wanderer v. Plainfield Carton Corp.*, 40 Ill. App. 3d 552, 351 N.E.2d 630 (1976); *Whitcomb v. Brant*, 90 N.J.L. 245, 100 A. 175 (N.J. 1917). *But see* RESTATEMENT (SECOND) OF PROPERTY §12.1 comment i, at 391 (1977).

¹⁴⁷455 N.E.2d at 379.

¹⁴⁸*Id.*

¹⁴⁹82 Ind. App. 196, 145 N.E.2d 587 (1924).

¹⁵⁰*Id.* at 198, 145 N.E. at 588. The court in *Waxman* noted that this result was reached without any clause in the lease. 455 N.E.2d at 379.

with no duty to account for the excess rent. The decisions do not seem to find anything unjust or inequitable with this result.

In *Tippmann Refrigeration Construction v. Erie-Haven, Inc.*,¹⁵¹ Tippmann Refrigeration Construction (Tippmann) leased, with an option to purchase, a garage from Erie-Haven, Inc. and France Stone Co. (Erie-Haven). The lease required Erie-Haven “to maintain fire and extended coverage insurance on the building being leased herein,”¹⁵² and allowed for the application of fifty percent of the rent paid to the purchase price if within twelve months from the effective date of the agreement Tippmann exercised its option to purchase. If Erie-Haven terminated the agreement before it expired, Tippmann was to recover a certain amount for some of the improvements made—other improvements were to be made at Tippmann’s own risk.¹⁵³

The building was destroyed by fire, and Erie-Haven terminated the lease “[p]ursuant to the lease-option provision on destruction of the premises.”¹⁵⁴ When Tippmann then tried to exercise the option to purchase, Erie-Haven refused either to sell or to share the fire insurance proceeds, and Tippmann filed suit. The trial court granted summary judgment for Erie-Haven.¹⁵⁵

The court of appeals examined the insurance clause and concluded that the provision was intended for the benefit of both parties.¹⁵⁶ Since the lessor is always free to carry insurance on the leased premises, the provision would be mere surplusage unless it was intended to benefit both parties. The court distinguished *Haney v. Denny*,¹⁵⁷ which held that the lessee with an unexercised option to purchase was not entitled to the condemnation proceeds. The court noted that in *Haney* there was no provision requiring the landlord to insure the premises. Thus, the trial court erred in granting summary judgment and the court remanded for a “determination of an appropriate division of insurance proceeds.”¹⁵⁸

Tippmann argued that the option to purchase was separate and divisible from the lease, and that it survived the termination of the lease. In support of this position, Tippmann argued that the provisions allowing credit for the rent and credit for the improvements against the purchase price constituted separate consideration. The court agreed that the usual

¹⁵¹459 N.E.2d 407 (Ind. Ct. App. 1984). For a further discussion of this case, see Arthur, *Insurance, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 265, 273-74 (1985).

¹⁵²459 N.E.2d at 409 (quoting the lease-option agreement).

¹⁵³*Id.*

¹⁵⁴*Id.* at 410.

¹⁵⁵*Id.* at 409.

¹⁵⁶*Id.* (citing *South Tippecanoe School Building Corp. v. Shambaugh & Son, Inc.*, 182 Ind. App. 350, 395 N.E.2d 320 (1979); *Morsches Lumber, Inc. v. Probst*, 180 Ind. App. 202, 204, 206, 388 N.E.2d 284, 286-87 (1979); *Woodruff v. Wilson Oil Company, Inc.*, 178 Ind. App. 428, 431, 382 N.E.2d 1009, 1011 (1978)).

¹⁵⁷135 Ind. App. 317, 193 N.E.2d 648 (1963).

¹⁵⁸459 N.E.2d at 410.

test of the severability of a contract is the divisibility of the consideration, but said that the wording of the contract did not support an interpretation that the consideration was separate but, rather, suggested that the agreement was entire and not severable.¹⁵⁹ While conceding that “[a] contract is not entire and indivisible simply because it is embraced in one instrument . . .”¹⁶⁰ and executed by the same parties, the court did consider this fact when it concluded, “We agree with Erie-Haven, further noting the option and lease are embraced in the same instrument, executed by the same parties on the same date.”¹⁶¹

Tippmann also argued that Erie-Haven would be unjustly enriched because the value of the building which was destroyed was \$12,000 and Erie-Haven had received approximately \$75,000 in insurance proceeds, claiming this was an “independent equity” which supported extending the option beyond the termination of the lease. The court found that, although Indiana law did not preserve options when independent equities exist,¹⁶² it need not address this issue since any alleged inequity would be removed by the division of the insurance proceeds.¹⁶³ The decision did not discuss how Tippmann would benefit from the exercise of the option since the building had been destroyed. Presumably, he would have argued that the seller now holds the insurance proceeds in trust for the purchaser.¹⁶⁴

F. Real Estate Transactions

1. *Real Estate Brokers.*—In *Panos v. Prentiss*,¹⁶⁵ James Prentiss, a real estate broker, recovered a broker’s commission for negotiating a

¹⁵⁹*Id.* at 410-11.

¹⁶⁰*Id.* at 410.

¹⁶¹*Id.* (citation omitted).

¹⁶²*Id.* at 411.

¹⁶³*Id.* The court of appeals did not provide any guidance to the trial court as to how the proceeds were to be divided between the parties. Because the lease was terminated and the option could not be exercised, the lessee does not appear to have had any “interest” in the property. The court suggested, however, that the lease-option provision requiring the lessor to insure the building gave the lessee an “interest” in the insurance proceeds. The appellate court stated that the trial court could make “an appropriate division of insurance proceeds.” *Id.* at 410.

¹⁶⁴In the case of an enforceable contract for the sale of real estate, most courts have concluded that the seller holds any insurance proceeds in trust for the buyer. See J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 159 (2d ed. 1975); Annot., 64 A.L.R.2d 1402, 1406-12 (1959). Tippmann’s exercise of the option would have turned the instrument into a contract for sale. However, without the insurance provision giving Tippmann an “interest” in the insurance, the general rule that the seller holds any insurance proceeds in trust for the buyer may not have applied, as the destruction occurred before Tippmann attempted to exercise the option. There is authority for the proposition that the lessee is not entitled to the proceeds from insurance carried by the owner where the loss occurs before the option is exercised. See Annot., 65 A.L.R.2d 989 (1959).

¹⁶⁵460 N.E.2d 1014 (Ind. Ct. App. 1984).

purchase of certain property, despite the absence of a written contract. The defendant, Panos, had approached James' father and employee, Richard Prentiss, seeking assistance in acquiring certain property. Panos agreed to pay Richard a commission of three percent of the total purchase price. Richard met with the owner and Panos, but the initial meetings were unsuccessful. A few months later, Panos requested that Richard resume negotiations. Richard convinced the owner to lower his price to \$200,000, but Panos was then willing to pay \$195,000. At a meeting between the parties, Richard negotiated a mutually satisfactory sales price of \$197,500 and a \$5,000 commission. James drafted the contract for sale according to the agreement, but Panos' attorney changed the terms, and the owner refused to accept them. At a second meeting, the parties reached an agreement, but when it was reduced to writing, Panos' attorney once again changed the terms. Panos then refused to complete the transaction because he was interested in another property. James later discovered that Panos had purchased the property for \$202,500.¹⁶⁶

In his appeal of the trial court's judgment for Prentiss, Panos contended that the agreement was to pay Richard \$5,000 if Richard could convince the owner to sell the property for \$197,500 or less, and that the sale at this price was a condition precedent to the recovery of the commission. The court disagreed. The agreement was to pay Richard three percent of the purchase price, and no specific purchase price was stated in the agreement. The sales price of \$197,500 and the commission figure of \$5,000 were first determined several months later as part of a negotiated agreement for the sale of the property.¹⁶⁷

The court noted that the broker's agreement between Richard and Panos was oral, but observed that the provision of the statute of frauds requiring a writing for all employment contracts for the sale of real estate between the owners and their brokers does not apply to contracts between real estate purchasers and their brokers.¹⁶⁸ Likewise, the court observed that the parties never consummated the contract for sale,¹⁶⁹

¹⁶⁶*Id.* at 1015-16. While Panos' subsequent purchase of the property from Dalton may have been what motivated James to file suit to recover his commission, the subsequent purchase of the property is not relevant to the issue of the broker's right to recover his commission. *See infra* text accompanying notes 169, 170.

¹⁶⁷460 N.E.2d at 1016. Even if the court had found the purchase price of \$197,500 to have been a condition precedent, Richard had convinced Dalton to sell the property for this amount and, as the court later remarked, "Panos's [sic] repeated refusals to complete the transaction . . . will not serve to relieve him from his duty to pay the Prentisses their broker's commission." *Id.* at 1016-17 (citations omitted).

¹⁶⁸*Id.* at 1016. Had the oral contract been between the broker and the owner of the real estate for the sale of the property, the broker could not have recovered his commission or even the value of his services in quantum meruit. *Zimmerman v. Zehendner*, 164 Ind. 466, 73 N.E. 920 (1905); *Gerardot v. Emenhiser*, 173 Ind. App. 353, 363 N.E.2d 1072 (1977).

¹⁶⁹460 N.E.2d at 1016. The Indiana statute of frauds provides that no action shall

but concluded that the broker's commission was not dependent upon the consummation of the sales contract: "a broker's right to compensation accrues upon completion of negotiations and upon the meeting of the minds of the principal and the customer procured" ¹⁷⁰ Once Panos and the owner had agreed to all the terms, Richard was entitled to his commission:

Where no purchase agreement has been consummated, a broker is entitled to his commission if he proves that he had secured a customer who was ready, willing, and able to sell or purchase the property upon the terms listed by the principal and the principal refused to complete the transaction. ¹⁷¹

The fact that Panos refused to complete the transaction could not affect the broker's right to his commission.

2. *Vendor and Purchaser*.—In *Bond v. Peabody Coal Co.*, ¹⁷² Peabody Coal Co. (Peabody) obtained a four year option to purchase the coal beneath land owned by Richard and Janet Bond (the Bonds). The option contract provided that Peabody could renew the option each year for four years by paying one fourth of the balance due the Bonds under the option, and that all payments made under the option would be credited to the purchase price. Peabody made renewal payments for the first three years, and in the fourth gave notice that it was exercising its option. The agreement provided that when Peabody gave notice of its election to purchase the coal, the Bonds had thirty days to deliver an abstract of title. Peabody then would have a reasonable time to examine the abstract, and if it showed marketable title of record in the Bonds, Peabody must "forthwith pay the purchase price." ¹⁷³ Upon payment, the Bonds were required to deliver a warranty deed conveying the coal to Peabody. ¹⁷⁴

The Bonds claimed that payment was too long delayed, and therefore the option was void, both because Peabody had not complied with their request for payment by a specific date and because Peabody did not tender payment until seventy-six days after the abstract of title was delivered to its agent. The trial court found that Peabody did not comply

be brought upon a contract or agreement for the sale of land unless it or some memorandum thereof shall be in writing and signed by the party to be charged. IND. CODE § 32-2-1-1 (1982). Since it does not appear that either party signed a written purchase agreement, the contract was unenforceable. But since it was the defendant who changed the terms orally agreed upon by the parties, and the seller appeared ready and willing to enter into a written agreement based upon the mutually agreed terms, the court found this sufficient to award the broker his commission. 460 N.E.2d at 1016.

¹⁷⁰460 N.E.2d at 1016.

¹⁷¹*Id.* (citations omitted).

¹⁷²450 N.E.2d 542 (Ind. Ct. App. 1983).

¹⁷³*Id.* at 547 (quoting the real estate contract).

¹⁷⁴*Id.*

with the contract's requirement that time be "of the essence," and granted summary judgment for the Bonds. The court also found, however, that because Peabody had paid seventy-five percent of the purchase price, the appropriate remedy should be foreclosure instead of forfeiture.¹⁷⁵

The court of appeals found that it was apparent from the trial court's conclusions of law "that its holding as to reasonableness of the time period involved was based on its acceptance of Bonds' argument that the parties intended that time would be of the essence in the payment of the purchase price, which would be due on January 24, 1979."¹⁷⁶ Both the Bonds and the trial court seemed to have believed that the provision requiring the last option payment to be paid on or before January 24, 1979 also required the purchase price to have been paid on or before that date.¹⁷⁷ The court of appeals pointed out that there was nothing in the agreement which suggested that the payment of the purchase price was a condition precedent to the exercise of the option, and that the notice by Peabody to the Bonds of its election to purchase was the stipulated act constituting the exercise of the option.¹⁷⁸ Once the plaintiff exercised the option, it was turned into a contract for sale, and the subsequent performance of the contract would be governed by the law of vendor-purchaser. The court then looked to see if there were any terms in the instrument or evidence indicating that the parties intended time to be of the essence in the performance of the contract. The only provision in the agreement which the court discovered regarding the time of performance was the one that after an examination of the abstract shows marketable title in the Bonds, "(Peabody) shall forthwith pay the purchase price to the (Bonds)"¹⁷⁹ The court found that the word "forthwith," when used in a contract or statute, was not as nearly equivalent to "time is of the essence" as the trial court had found, but it means only that the act referred to should be performed within such convenient time as is reasonably requisite.¹⁸⁰ But, the court concluded, even if there had been a "time is of the essence" clause, such a contract provision is ineffective when no date for performance is specified in the contract.¹⁸¹ In such a case, the sellers, after waiting what they consider to be a reasonable time for performance, can fix a date for performance

¹⁷⁵*Id.* at 545.

¹⁷⁶*Id.* at 546.

¹⁷⁷Some courts do require that the purchase price be paid within the option period. See Annot., 71 A.L.R.3d 1201 (1976) (citing *Kritz v. Moon*, 88 Ind. App. 5, 163 N.E. 112 (1928), for the proposition that payment of the purchase price is not a condition precedent to the exercise of the option. 71 A.L.R.3d at 1220).

¹⁷⁸450 N.E.2d at 547 n.2.

¹⁷⁹*Id.* at 547 (quoting the real estate contract).

¹⁸⁰*Id.*

¹⁸¹*Id.* at 548.

and thereby limit the time of their liability under the contract, but they cannot unilaterally fix an unreasonable time for performance.¹⁸²

Having concluded that Peabody had a reasonable time to perform the contract after the exercise of the option to purchase, the court observed that there were in fact two periods of time to consider: a reasonable period of time for Peabody's attorney to examine the abstract of title to see if the Bonds had marketable title of record, and a reasonable period of time after a favorable opinion to "forthwith pay the purchase price." Since Peabody offered to close only eight days after receiving the favorable title opinion, the court found that the only issue was whether or not the examination of the abstract was completed within a reasonable time. There was evidence by the Bonds that thirty or forty days was a reasonable time, but Peabody's attorney pointed out that the period of time at issue included the Christmas and New Year's holidays, and during this time Peabody's attorney was sick for a period of ten days, relocated his law offices, and was busy performing additional legal tasks. The court found that the question of whether or not the examination was performed within a reasonable time was a question of fact which precluded summary judgment on the issue.¹⁸³

Finally, the court addressed the issue of the appropriate remedy, making it clear that it found a foreclosure action to be inappropriate. The court concluded that if the trial court found that the examination of the abstract was not performed within a reasonable time it should still "grant specific performance to Peabody, but provide additional relief, e.g. interest, to the Bonds in order to 'equalize any losses occasioned by the delay'"¹⁸⁴ This decision to reject "forfeiture" as an appropriate remedy seems well within the power of a court of equity.

G. Water Law

1. *Surface Water*.¹⁸⁵—In 1982, the Indiana Supreme Court, in *Argyelan v. Haviland*,¹⁸⁶ reaffirmed Indiana's adherence to the "common

¹⁸²*Id.* at 549.

¹⁸³*Id.* at 548-49.

¹⁸⁴*Id.* at 500 (quoting *North v. Newlin*, 435 N.E.2d 314, 319 (Ind. Ct. App. 1982) (quoting *Greenstone v. Claretian Theological Seminary*, 173 Cal. App. 2d 21, 29, 343 P.2d 161, 165 (1959))).

¹⁸⁵Surface water has been judicially defined as "[w]ater from falling rains or melting snows which is diffused over the surface of the ground or which temporarily flow [sic] upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel." *Capes v. Barger*, 123 Ind. App. 212, 214-15, 109 N.E.2d 725, 726 (1953) (citations omitted).

¹⁸⁶435 N.E.2d 973 (Ind. 1982). In April of 1981, the Second District Indiana Court of Appeals, in *Argyelan v. Haviland*, 418 N.E.2d 569 (Ind. Ct. App. 1981), *vacated*, 435 N.E.2d 973 (Ind. 1982), applied the "common enemy" rule to a surface water case. In

enemy doctrine.”¹⁸⁷ Surface water is a common enemy and “each landowner may deal with it in such manner as best suits his own convenience.”¹⁸⁸ Generally, he will not be liable for any injury caused to his neighbor’s land by such action.¹⁸⁹ While suggesting that Indiana would not permit a “malicious or wanton employment of one’s drainage rights,”¹⁹⁰ the court recognized only one exception to the landowner’s right to combat surface water: “one may not collect or concentrate surface water and cast it, in a body, upon his neighbor.”¹⁹¹

During this survey period there were two surface water cases. In *Earth Construction & Engineering, Inc. v. DeMille*,¹⁹² Earth Construction, during construction of a sanitary sewer line, cleared the vegetation and eliminated a small ditch from a field across the street from a house owned by the plaintiff (DeMille). As a result, the surface water which accumulated after a rainstorm damaged the plaintiff’s house. The trial court awarded damages to the plaintiff, and Earth Construction appealed. The court of appeals concluded that the common enemy rule set forth in the *Argyelan* decision precluded recovery by the plaintiff.¹⁹³ Earth Construction, as the contractor, was entitled to stand in the shoes of its employer, the city of Fort Wayne, who would not be liable for damage caused by the alteration of the surface water drainage under the common enemy rule. The court did not appear to see any problem in extending to the city the landowner’s right to change the flow of surface water, apparently reasoning that since the city would not be held to have made an unconstitutional taking of land if its grading of an area caused damage, it should not be held liable for consequential damages resulting from the alteration in the flow of surface water.¹⁹⁴

December of 1981, however, the Third District Indiana Court of Appeals, in *Rounds v. Hoelscher*, 428 N.E.2d 1308 (Ind. Ct. App. 1981), rejected the “common enemy” rule in favor of a “reasonable use” test. The Indiana Supreme Court granted transfer in the *Argyelan* case to settle the conflict. 435 N.E.2d at 974.

¹⁸⁷The court in *Argyelan* reaffirmed the statement in *Taylor v. Fickas*, 64 Ind. 167 (1878):

“The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit . . . by changing the surface . . . is not restricted . . . by the fact that . . . it will cause water, which may accumulate thereon by rains . . . to stand in unusual quantities on other adjacent lands, or pass into or over the same”

The obstruction of surface water or an alteration in the flow of it affords no cause of action”

Id. at 173 (quoting *Gannon v. Hargadon*, 92 Mass. 106 (1865)).

¹⁸⁸435 N.E.2d at 975.

¹⁸⁹*Id.* at 977.

¹⁹⁰*Id.* at 976.

¹⁹¹*Id.* (citations omitted).

¹⁹²460 N.E.2d 984 (Ind. Ct. App. 1984).

¹⁹³*Id.* at 985.

¹⁹⁴*Id.* at 986. In a footnote, the court indicated that the trees and shrubs were removed

In *Bell v. Northside Finance Corp.*,¹⁹⁵ the Indiana Supreme Court continued to follow the common enemy doctrine, but reversed a summary judgment in favor of the landowners who had changed the flow of surface water on the basis that the appellant had raised several material factual issues. This case applied the exception recognized in *Argyelan*, that a party may not collect surface water “and cast it, in a body, upon his neighbor,”¹⁹⁶ to a situation where the drainage system constructed by a corporation’s plant discharged the water to an area with an elevation slightly higher than the neighboring property. The neighboring landowners introduced evidence at the hearing that the corporation had cut a trench through a natural ridge. According to the court, this evidence raised a material factual issue as to whether or not such a trench existed, making the trial court’s grant of summary judgment improper. The court also reversed on another issue. There was evidence that an artificial drain existed on the Bell property, and that an artificial underground tile ran across the corporation’s property and into adjacent property. This drain was excavated and obstructed. The court found that if a landowner collects surface water into an artificial channel and discharges it across the land of his neighbor for a sufficient length of time, he can acquire a prescriptive easement.¹⁹⁷ Similarly, if a person is given a license and expends money on the faith of the license, the license cannot be revoked until the licensee can be placed in status quo, and may impose a servitude upon one estate in favor of another.¹⁹⁸ Thus, the court seems to have recognized another exception to the common enemy rule: a landowner may combat surface water, but may not do so in such a manner as to interfere with another’s easement or license to drain surface water.

2. *Ground Water*.¹⁹⁹—In 1982, there were two conflicting court of appeals decisions involving the use of ground water. In *Wiggins v. Brazil Coal and Clay Corp.*,²⁰⁰ the Indiana Court of Appeals, First District, held the owner of a strip mining pit liable for the loss of water in a lake caused by the pumping of ground water from the pit in order to continue mining operations. In doing so, the court adopted a “reasonable

from the field at the request of the landowner. *Id.* at 986 n.3. The court did not indicate or suggest that this fact played any role in the decision.

¹⁹⁵452 N.E.2d 951 (Ind. 1983).

¹⁹⁶435 N.E.2d at 976 (citations omitted).

¹⁹⁷452 N.E.2d at 954.

¹⁹⁸*Id.*

¹⁹⁹Ground water has been defined as “lost water that percolates the soil below the surface of the earth, in hidden recesses, without a known channel or course.” *Taylor v. Fickas*, 64 Ind. 167, 172 (1878). Water which flows in an underground stream with a definite channel is not considered ground water, and is governed by the same laws that apply to surface streams. *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687, 696, 72 N.E. 849, 852 (1904).

²⁰⁰440 N.E.2d 495 (Ind. Ct. App. 1982).

use" test advocated by the Restatement (Second) of Torts section 858.²⁰¹ The opinion discussed the two traditional positions regarding ground water, the English rule and the American rule. Under the English, or "absolute ownership," rule, the owner of the land has an absolute right to use water beneath his land for any purpose.²⁰² The English rule has been rejected in most states and replaced with the American, or "reasonable use," rule, which allows the owner of the surface to appropriate underground water for any use which is reasonably necessary for some beneficial purpose relating to the land.²⁰³ If the use meets this test, however, the adjacent landowners' rights and interests are not considered.²⁰⁴ Recently, courts in a few states have adopted the California, or "correlative rights," rule, which "holds that the rights of all landowners over a common aquifer are coequal" and that the "landowner cannot extract more than his share of the water even for use on his own land where others' rights are thereby injured."²⁰⁵ In rejecting the American rule, the *Wiggins* court did not apply the apportionment concept of the California rule, a rule which is better adapted to the needs of areas where water is scarce. Instead, the court recognized the "reasonable use" test formulated in the Restatement (Second) of Torts section 858 as a "logical answer to this problem,"²⁰⁶ despite the fact that the Indiana Supreme Court had just rejected the "reasonable use" rule with regard to surface water in *Argyelan v. Haviland*.²⁰⁷ The court distinguished *Argyelan* on the basis that the opinion applied to surface water rather

²⁰¹*Id.* at 500-01. Section 858 provides:

Liability for Use of Ground Water

(1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

(a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,

(b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or

(c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

(2) The determination of liability under clauses (a), (b) and (c) of Subsection (1) is governed by the principles stated in §§ 850 to 857.

RESTATEMENT (SECOND) OF TORTS § 858 (1979).

²⁰²440 N.E.2d at 497 (citing *Finley v. Teeter Stone*, 251 Md. 554, 559, 248 A.2d 106, 110 (1968)).

²⁰³440 N.E.2d at 497 (citing *Metropolitan Utils. Dist. v. Merritt Beach Co.*, 179 Neb. 783, 796, 140 N.W.2d 626, 637 (1966)).

²⁰⁴440 N.E.2d at 499; R. CUNNINGHAM, W. STOEBUCK, & D. WHITMAN, *THE LAW OF PROPERTY* 428 (1984).

²⁰⁵440 N.E.2d at 497 (citation omitted).

²⁰⁶*Id.* at 500.

²⁰⁷*See supra* text accompanying notes 186-91.

than ground water problems.²⁰⁸ The appellate court went on to apply the Restatement position rather than the common law and held the mining company could be liable for the damage caused by its pumping operation, reasoning that the company could not shift the cost of doing business to neighbors, but must pass on the burdens and expenses of its operation to the consumer.²⁰⁹

The Indiana Court of Appeals, Second District, reached a conflicting conclusion in *Irving Materials, Inc. v. Carmody*,²¹⁰ holding that the owner of a gravel pit was not liable for injury to his neighbors when the pumping of water from the pit into a nearby stream caused several wells in the area to go dry. The trial court had awarded damages for the neighboring landowners' well digging expenses. In reversing the trial court's judgment, the court of appeals applied the American rule,²¹¹ and held that the injury was not the result of a legal wrong; so long as the owner is making a reasonable use of the land, he has every right to use the ground water beneath his land without regard to its effect upon his neighbors.²¹²

During this survey period, the Indiana Supreme Court resolved the conflict in its affirmance of the trial court's judgment in favor of Brazil Coal in *Wiggins*.²¹³ The court of appeals had relied in part upon the Federal Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act)²¹⁴ in reaching its decision to reject the common law rules governing the use of ground water.²¹⁵ The Indiana Supreme Court rather quickly disposed of the Surface Mining Act by noting that the statute did not directly govern the case.²¹⁶ In a somewhat confusing paragraph,

²⁰⁸440 N.E.2d at 501.

²⁰⁹*Id.*

²¹⁰436 N.E.2d 1163 (Ind. Ct. App. 1982).

²¹¹See *supra* text accompanying notes 229-30.

²¹²436 N.E.2d at 1164.

²¹³452 N.E.2d 958 (Ind. 1983). The court's opinion does not mention the *Irving* decision, presumably because it adheres to existing Indiana law.

²¹⁴30 U.S.C. §§ 1201-1328 (1977).

²¹⁵440 N.E.2d at 498-99.

²¹⁶452 N.E.2d at 962. Justice Hunter, however, in his dissenting opinion, noted that the Surface Mining Act did not become effective until after the plaintiff's cause of action arose, and that the interim portion of the Act did not include the section which the court of appeals invoked. Nevertheless, Justice Hunter pointed out that Indiana had subsequently enacted the regulatory programs required by the Surface Mining Act, IND. CODE § 13-4.1-8-1 (1982), and that the decision would have been decided differently had the defendant's action occurred in Indiana today. 452 N.E.2d at 965 (Hunter, J., dissenting). IND. CODE § 13-4.1-8-1(25) (1982) would require the coal company to replace the water of an owner of land who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source which has been contaminated or interrupted by coal mining and reclamation operations. Justice Hunter seems to have assumed the statute would govern the loss of the water from the lake, but the facts indicate that the Wigginses had developed the land along the lake for recreational,

the court noted that the appellants cited "Indiana statutes relating to water resources" which "do not directly govern the issue presented" in an attempt "to persuade this tribunal that the public policy of the State is moving in the direction of recognizing that property in water should not be absolute in the owner of land where it is found."²¹⁷ The court concluded: "In light of their aforementioned use in this appeal, we have no cause to undertake that task here."²¹⁸ This is confusing because the only statute cited in the court of appeals decision was the Surface Mining Act; the court did not indicate which Indiana statutes the appellants cited, and the only "aforementioned use" of any statute in the majority opinion is the sentence stating: "The statutes cited to do not directly govern the issue presented."²¹⁹ Presumably, the supreme court was indicating that it was not going to examine the Indiana statutes relating to water law since none of them were directly controlling and that it was not going to use this occasion to formulate a public policy on the use of ground water.

The court cited four cases,²²⁰ three more than one hundred years old and one more than eighty years old, for the rule that ground water belongs to the owner of the land beneath which it is found:

The property in the lost water that percolates the soil below the surface of the earth . . . and property in the wild water that lies upon the surface . . . but without a channel . . . fall within the maxim that a man's land extends to the centre of the earth below the surface, and to the skies above, and are absolute in the owner of the land, as being a part of the land itself.²²¹

The only exception to this rule recognized by the court was that "this right does not extend to causing injury gratuitously or maliciously to

residential, and retirement homes and that the Stevenson tract was mainly soil bank land. There is no suggestion they were using the lake as a water supply, unless you interpret "other legitimate use" to include recreational use of the waters.

²¹⁷452 N.E.2d at 962.

²¹⁸*Id.*

²¹⁹*Id.* While the "statutes" referred to are unclear, it would appear from the court of appeals decision and the dissenting opinion that the court is referring only to the Federal Surface Mining Act, 30 U.S.C. §§ 1201-1328 (1977), and the Indiana Surface Coal Mining and Reclamation Act, IND. CODE § 13-4.1-1-1 to -6 (1982). On the other hand, the court might be referring to a very substantial body of statutory law contained in Title 13 governing water conservation. Article 2, section 2 regulates the use of ground water. IND. CODE § 13-2-2-2 (1982) provides: "It is hereby declared a public policy of this state in the interest of the economy, health and welfare of the state and its citizens, to conserve and protect the ground water resources of the state. . . ." *Id.* However, many of the enforcement provisions of this section were added after the plaintiffs' cause of action arose. See *infra* note 233.

²²⁰The court cited *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687, 72 N.E. 849 (1904); *Taylor Admr. v. Fickas*, 64 Ind. 167 (1878); *City of Greencastle v. Hazelett*, 23 Ind. 186 (1864); *New Albany & Salem Railroad Co. v. Peterson*, 14 Ind. 112 (1860).

²²¹*Taylor v. Fickas*, 64 Ind. 167, 172 (1878) (citations omitted).

nearby lands and their owners.’’²²² Applying these rules to the case at bar, the court found that the mining was not done with the intent or purpose to injure the plaintiffs, and that the removal of the water was in connection with a beneficial use of the land and not done gratuitously.²²³ Thus, the trial court’s judgment in favor of the coal company was affirmed.

In a scholarly dissenting opinion, Justice Hunter noted that the majority opinion was in conflict with the Surface Mining Act, which, though not in effect at the time the cause of action arose, expressed the intent of Congress to protect the public and the environment from damages resulting from strip mining, and is in conflict with the present Indiana law.²²⁴ While recognizing that judicial devotion to the doctrine of stare decisis is a noble and justifiable tradition, Justice Hunter argued that departure from the doctrine is necessary when the rationale for the existing rule of law no longer exists.²²⁵ Justice Hunter agreed with the court of appeals that the rules governing ground water developed at a time when there was little knowledge of hydrology,²²⁶ and that the concept of absolute ownership of property has diminished now that the landowner is subject to nuisance, pollution controls, zoning, and other laws affecting the use of his land.²²⁷ In an argument similar to the one presented in his dissenting opinion in *Argyelan*,²²⁸ Justice Hunter suggested that damages caused from the use of water should not be treated any differently than damages caused by other uses of land, such as noise and pollution. Under the maxim *sic utere tuo ut alienum non laedas* (use your property so as not to cause injury to the rights of others), the owner of land should be liable for the unreasonable harm caused to others by the use of his land.²²⁹ There should be no difference between the right of a riparian owner to use the water in a stream, which is governed by the doctrine of reasonable use, and the right of an owner of land to use

²²²452 N.E.2d at 964.

²²³*Id.*

²²⁴*Id.* at 965 (Hunter, J., dissenting).

²²⁵*Id.* at 966-67 (Hunter, J., dissenting).

²²⁶*Id.* at 966. The Governor’s Commission on Water Rights defined the problem as follows:

3) The existing law of water rights (basically the common law) is inadequate to provide that legal basis and management framework within which human, social and economic needs for water may be satisfied in a timely and equitable manner. This conclusion is based on the finding that:

(e) It provides no basis for recognition of the interrelated nature of the various components of the water resource and of the relative impacts of uses of the various components.

GOVERNOR’S WATER RIGHTS AND MANAGEMENT COMMISSION, STATE OF INDIANA, REPORT TO GOVERNOR ROBERT D. ORR 3 (1982).

²²⁷452 N.E.2d at 966 (Hunter, J., dissenting).

²²⁸435 N.E.2d 973, 989 (Hunter, J., dissenting).

²²⁹452 N.E.2d at 966-68 (Hunter, J., dissenting).

the water beneath his land.²³⁰ Justice Hunter's opinion does not preclude the coal company from dewatering its pits, but it would prevent the coal company from forcing the plaintiff to pay a portion of its cost of doing business by denying them recovery for damages caused by the mining operations.²³¹

The increasing statutory regulation of the use of Indiana water suggests that a public policy is being developed by the legislature.²³² Recently, the legislature responded to the potential harm to adjoining landowners in Jasper and Newton Counties caused by the use of ground water for extensive irrigation of farmland by enacting special legislation addressing the problem.²³³ The court may have decided not to undertake the task of determining a public policy on the use of ground water in light of the legislative developments in this area.

3. *Riparian Rights*.²³⁴—In *Bath v. Courts*,²³⁵ the court of appeals discussed the riparian rights of landowners abutting a "public freshwater

²³⁰*Id.* at 966-67 (Hunter, J., dissenting).

²³¹*Id.* at 965, 967 (Hunter, J., dissenting). See also the court of appeals decision, 440 N.E.2d at 501.

²³²See *supra* note 219.

²³³After the Prudential Insurance Company of America began irrigation of approximately 7,000 acres of its 23,000 acre Fair Oaks Farm in Jasper and Newton Counties, farmers in the area complained that their wells were going dry; there was an odor of hydrogen sulfide in the air and a loss of wildlife in the area. *Prohosky v. Prudential Ins. Co. of America*, 584 F. Supp. 1337 (N.D. Ind. 1984). Special legislation was enacted in 1982 giving the Department of Natural Resources the authority to declare an emergency in Jasper and Newton Counties when the water level in the aquifer fell below a certain level and the power to restrict the amount of ground water which can be extracted from any well with the capacity of producing more than 100,000 gallons of water per day. IND. CODE § 13-2-2.5-3 (1982). The statute also required the registration of all wells in Jasper and Newton Counties capable of producing more than 100,000 gallons per day. *Id.* § 13-2-2.5-4. In 1983, the legislature passed legislation creating a natural resource commission to inventory the state's water resources and to determine minimum flows of streams and minimum safe levels of ground water in aquifers. IND. CODE § 13-2-6.1-1 to -9 (Supp. 1984). There is also a provision requiring the registration of all facilities capable of withdrawing more than 100,000 gallons of ground water, surface water, or a combination thereof in one day. IND. CODE § 13-2-6.1-7 (Supp. 1984).

²³⁴"There are certain interests and rights vested in the shore owner which grow out of his special connection with such waters as an owner. These rights are common to all riparian owners on the same body of water, and they rest entirely upon the fact of title in the fee to the shore land."

Thompson v. Enz, 379 Mich. 667, 683-84, 154 N.W.2d 473, 482 (1967); *Brown v. Heidersbach*, 172 Ind. App. 434, 440, 360 N.E.2d 614, 619 (1977) (quoting *Thompson v. Enz*, 379 Mich. 667, 683-84, 154 N.W.2d 473, 482 (1967) (The language quoted is originally found in *Sanborn v. Peoples Ice Co.*, 82 Minn. 43, 50, 84 N.W. 641, 642 (1900)). Historically, the term "littoral rights" has been used to refer to the rights of the owner of lakeshore property, but today the term "riparian rights" is being used by most courts to describe the rights of an owner of land abutting both lakes and streams. Munro, *Public v. Private: The Status of Lakes*, 10 BUFFALO L. REV. 459, 467 (1961).

²³⁵459 N.E.2d 72 (Ind. Ct. App. 1984).

lake.”²³⁶ The parties to the case owned adjoining lakefront lots. The plaintiffs constructed a pier at an angle to avoid interference with a public pier, and in so doing crossed the defendants’ “extended” property line.²³⁷ The defendants built a pier parallel to the parties’ common property boundary and so close to the plaintiffs’ pier that it interfered with its use. The trial court granted the plaintiffs’ an injunction for the removal of the defendants’ pier, and allowed the plaintiffs to maintain their pier because it did not unreasonably interfere with either the defendants’ riparian rights or the public’s use of the lake.²³⁸ On appeal, the defendants maintained that because their property line extended to the center of the lake, the plaintiffs had to remove their pier.

The court of appeals adopted the Wisconsin rule that “where the onshore property boundaries are perpendicular to the shore, the boundaries are determined by extending the onshore boundaries into the lake.”²³⁹ The court refused, however, to extend the onshore boundaries to the middle of the lake, citing an early Indiana Supreme Court decision which held that, in the case of a closed lake, as was this lake, the riparian owner does not own to the middle of the lake, because such a rule would exclude some owners from title to any of the waterbed.²⁴⁰ The court observed that the nature of the owner’s riparian rights in the early decisions turned on the status of the waters as navigable or nonnavigable,²⁴¹ but the court concluded that the determination of the “navigability” of the lake was unnecessary because the governing statute²⁴² made no distinction between navigable and nonnavigable “public freshwater lakes.”²⁴³ The court then concluded that riparian owners abutting

²³⁶The statute in effect at the time of the suit defined public freshwater lakes as “all lakes which have been used by the public with the acquiescence of any or all riparian owners . . . [excluding Lake Michigan and any lake which lies in whole or in part within a city of the second class in Lake County].” IND. CODE § 13-2-14-2 (repealed 1982). The definition of public freshwater lake is now found in IND. CODE § 13-2-11.1-1 (1982).

²³⁷459 N.E.2d at 73. The court did not use the word “extended,” but the facts clearly indicate the pier crossed the Baths’ property at a point beyond the shore line and thus was on the Baths’ property only if it extended into the lake.

²³⁸*Id.*

²³⁹*Id.* (citing *Nosek v. Stryker*, 103 Wis. 2d 633, 635, 309 N.W.2d 868, 870 (1981)).

²⁴⁰459 N.E.2d at 75 (citing *Stoner v. Rice*, 121 Ind. 51, 53-54, 22 N.E. 968, 969 (1889)).

²⁴¹459 N.E.2d at 75. It should be noted that the cases cited by the court extending the onshore boundaries to the lands beneath the superjacent waters were decisions involving nonnavigable bodies of water. Indiana decisions have always held that the state holds title to the lands beneath navigable waters. *E.g.*, *State v. Kivett*, 228 Ind. 623, 95 N.E.2d 145 (1950); *Lake Sand Co. v. State*, 68 Ind. App. 439, 120 N.E. 714 (1918).

²⁴²IND. CODE § 13-2-11-1 (repealed 1982) (similar version at IND. CODE §§ 13-2-11.1-1 to -14 (1982)).

²⁴³459 N.E.2d at 75. It is clear from a reading of the statute that public rights are not made to depend upon the navigability of the lake. *See Waite, Public Rights in Indiana Waters* 37 IND. L.J. 467, 483-85 (1962).

the lake had the right to build and maintain piers which did not interfere with others' use of the lake.²⁴⁴

Although the plaintiffs' pier unlawfully encroached upon the defendants' shorefront property, the court of appeals did not require it to be removed, but indicated that the pier need only be straightened so that it no longer encroached upon the neighboring property. The court of appeals agreed with the trial court that the defendants' only purpose in building their pier was to interfere with the plaintiffs' use of their pier, an unlawful purpose contrary to the statute allowing piers to be "maintained for commerce, navigation, and the owner's enjoyment."²⁴⁵

When one examines the decision closely, it appears the court of appeals was struggling in its attempt to determine the rights of riparian owners of public freshwater lakes. It is true, as the court points out, that the statute on public freshwater lakes makes no distinction between navigable and nonnavigable lakes, yet the cases cited by the court for extending the onshore boundaries into lakes and streams were cases involving nonnavigable bodies of water.²⁴⁶ Likewise, the statute cited as authority for the right of a riparian owner to construct a pier applies only to landowners "bordering upon a navigable stream."²⁴⁷ It is, therefore, difficult to comprehend how the court could reach the conclusion that "our statutory law renders such a determination [of navigability] unnecessary."²⁴⁸ The statute on public freshwater lakes appears to be equally silent with regard to the ownership of the land beneath the public freshwater lakes or the right of the riparian owner to build a pier on such lakes. The only case which supports the position that the riparian owner abutting a public freshwater lake may construct a pier on the lake is *Brown v. Heiderbach*,²⁴⁹ which presumes such a right without any discussion of the navigability of the lake or any reference to the public freshwater lake statute. The present statute on public freshwater lakes raises serious questions as to the rights of the riparian owners both to the lands beneath the waters and the waters themselves. While the statute does not directly address the ownership of the bed of such lakes, it does provide that the "natural resources and the natural scenic beauty of Indiana are a public right" and that the State of Indiana "holds and controls all of such lakes in trust for the use of all of its citizens."²⁵⁰ The statute defines "natural resources" as "the water, fish, plantlife, and minerals in a public freshwater lake," and defines "natural scenic beauty" as "the natural condition as left by nature without

²⁴⁴459 N.E.2d at 75-76 (citing IND. CODE § 13-2-4-5 (1982)).

²⁴⁵*Id.* at 76 (citing IND. CODE § 13-2-4-5 (1982)).

²⁴⁶*See supra* note 241.

²⁴⁷IND. CODE § 13-2-4-5 (1982).

²⁴⁸459 N.E.2d at 75 (footnote omitted).

²⁴⁹172 Ind. App. 434, 360 N.E.2d 614 (1977).

²⁵⁰IND. CODE § 13-2-11.1-2(a), (b) (1982).

manmade additions or alterations.”²⁵¹ The landowner cannot change the water level or shoreline without a permit from the Department of Natural Resources,²⁵² nor will such a permit be issued authorizing the dredging or mining of a lake without first holding a public hearing.²⁵³ The statutes would appear to raise some interesting constitutional issues. If the waters were nonnavigable before the enactment of the statutes, the landowner would not only have owned the bed beneath the waters but could have excluded others from using the superjacent waters.²⁵⁴ Thus, the statute would appear to be a taking of property without due process of law.²⁵⁵ One can see, therefore, why the court might wish, by slight of hand, to avoid opening this Pandora’s box and instead decide the case on more traditional rules of water law.²⁵⁶

²⁵¹*Id.* § 13-2-11.1-1.

²⁵²*Id.* § 13-2-11.1-3.

²⁵³*Id.* § 13-2-11.1-6.

²⁵⁴*Sanders v. DeRose*, 207 Ind. 90, 191 N.E. 331 (1934); *Patton Park Inc. v. Pollak*, 115 Ind. App. 32, 55 N.E.2d 328 (1944).

²⁵⁵*Cf.* *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (holding that a zoning ordinance prohibiting a landowner from filling in a nonnavigable wetland on his property was constitutional and not a taking of property without due process). For an interesting discussion of whether the freshwater lake statute would permit one of a group of riparian owners, by inviting a member of the public to use the lake, to change a private lake into a public lake, and if so whether the statute would be constitutional, see Waite, *supra* note 243, at 481-83.

²⁵⁶For a discussion of a zoning case decided during this survey period, see the discussion of *Ailes v. Decatur Area Planning Comm’n* in Macey, *Constitutional Law, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 129, 137 (1985).

XIII. Taxation

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A. Introduction

This Survey Article is concerned with recent developments in the area of Indiana state taxation. Included in this Article are the most important cases concerning corporate gross income tax, inheritance tax, sales tax, and property tax. Of particular importance is a decision by the Supreme Court of Indiana concerning the exemption from sales tax for the purchase of equipment to be *directly* used in *direct* production. Also included in this Article are recent statutory developments concerning individual adjusted gross income tax, corporate partnerships, small business corporations, and the county option income tax. The discussion also includes an important administrative announcement pertaining to Indiana's position as it applies to the principles of unitary taxation to corporations doing business in Indiana. This issue arose after a United States Supreme Court decision which enhanced the authority of the states to tax the income of foreign affiliates of corporations doing business in their state.

B. Gross Income Taxation

In *Indiana Department of State Revenue v. Kroger Co.*,¹ Kroger claimed that trading stamps given to customers at the time of purchase reduced its gross receipts and thereby subjected only the price paid by the customer less Kroger's cost for the trading stamps to the gross income tax. The Indiana Gross Income Tax Act² provides that gross income, except as otherwise provided, includes the "gross receipts of the taxpayer received from trades, businesses, or commerce."³ The statute

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¹453 N.E.2d 1175 (Ind. Ct. App. 1983).

²IND. CODE §§ 6-2-1-1 to 36 (1976) (recodified at IND. CODE §§ 6-2.1-1-1 to 6-2.1-8-10 (1982)). Many of the cases in this Survey Article were decided under the 1976 version of the Indiana Code. Although much of the tax code was recodified in the 1982 version, the changes, except where noted, were not substantial, and the current version is cited parenthetically where the applicable code section has been replaced.

³IND. CODE § 6-2-1-1(m) (1976) (recodified at IND. CODE § 6-2.1-1-2(a)(1) (Supp. 1984)).

also provides a specific exclusion for the amount of "cash discounts allowed and taken on sales."⁴ Kroger argued that giving Top Value Trading Stamps to its customers who could redeem the stamps for merchandise or, pursuant to state law, receive cash based on their cash redemption value from Kroger or Top Value⁵ reduced Kroger's "gross receipts."

The Department of Revenue claimed that the issuance of the trading stamps was not a cash discount but a "cost of doing business."⁶ The Department found the distribution of trading stamps to be more in the nature of an "advertising ploy," not a cash discount to Kroger customers.⁷ The court stated it had not previously addressed this precise issue and found most closely analogous to it the case of *Indiana Department of State Revenue v. Marsh Supermarkets, Inc.*⁸ Although *Marsh* involved a question under sales tax law, the central issue was whether or not the distribution of coupons to customers, entitling them to discounts on certain Marsh items, reduced the amount of the sale subject to sales tax to the price less the discount distributed to the customer. The court stated that in *Marsh* it had found in favor of the taxpayer because the coupons' "effect was to lower the price paid by customers."⁹ The court noted that it also had held that supplier discounts were exempt from sales tax because they lowered the price paid by the taxpayer to its supplier and therefore did not contribute to Marsh's gross income.¹⁰ In *Kroger*, the court recognized that *Marsh* was distinguishable in that it was a sales tax case, the discounts were "received" by Marsh and not its customers, and the discounts clearly reduced the price paid to Marsh.¹¹

In reviewing similar cases of other jurisdictions, the court noted a crucial distinction with respect to these cases and Indiana law which requires that the trading stamps of Kroger must be redeemable for cash.¹² This caused the court to conclude that the issuance by Kroger of the Top Value Trading Stamps was a "cash discount."¹³ The court concluded that even without the existence of the specific statute requiring that the stamps be redeemable for cash it would have, nevertheless, held that the stamps represented a cash discount.¹⁴

⁴IND. CODE § 6-2-1-1(m) (1976) (recodified at IND. CODE § 6-2.1-1-2(c)(11) (Supp. 1984)).

⁵IND. CODE § 24-4-2-3 (1982).

⁶453 N.E.2d at 1177.

⁷*Id.*

⁸412 N.E.2d 261 (Ind. Ct. App. 1980).

⁹453 N.E.2d at 1177.

¹⁰*Id.*

¹¹*Id.* at 1178.

¹²*Id.* (citing IND. CODE § 24-4-2-2 (1982)).

¹³453 N.E.2d at 1178.

¹⁴*Id.* (citing Eisenberg's White House, Inc. v. State Bd. of Equalization, 72 Cal.

The court recognized that both parties made compelling arguments for their position.¹⁵ Based upon its analysis of the “economic effect of the trading stamps,” the court concluded that they were “cash discounts” because they were redeemable in cash and because they had a cash value.¹⁶ Kroger customers purchasing items and receiving trading stamps were deemed to have received something of value in return for their purchase which ultimately reduced the net proceeds to Kroger, even though Kroger received the collateral benefit of the advertising.¹⁷

In *Kroger*, the Indiana Court of Appeals provided sound reasoning for its holding that the gross income of a retail grocer does not include the value of trading stamps. Nevertheless, the court’s approach in determining the reduction to the grocer’s gross income is not entirely consistent with the applicable statutes. The court, apparently at the request of Kroger, permitted Kroger to reduce its gross income by the value of its payment to Top Value Trading Stamps for Kroger’s purchase of these trading stamps. The court did not indicate whether it considered the payments by Kroger to Top Value as equivalent to that value which the customers received by way of the trading stamps upon their purchases from Kroger. The focus of the opinion is that customers pay Kroger in cash for their purchases and receive the purchased items plus certain trading stamps which are considered to reduce the cash received by Kroger upon the purchase. It would seem, therefore, that the reduction for gross income tax purposes should be the actual value of the trading stamps issued to customers throughout the year in question.

The premise that the payment by Kroger to Top Value was equivalent to the value paid by Kroger to its customers presents at least two problems. First, the payments by Kroger to Top Value would not necessarily occur in the same tax year and in the same amount as the actual distribution of stamps to Kroger’s customers. In fact, it would seem that in order for Kroger to have the stamps available for distribution to customers, the purchase of these stamps would occur at a time prior to the actual sale of goods and distribution of stamps to the customers.

The second problem with using the price paid by the grocer to the trading stamp issuer is that there is no assurance that the price paid to the trading stamp company will necessarily equal or exceed the value of the trading stamps to receiving customers. It is conceivable that trading stamp companies require some sort of a premium from the grocer purchasing trading stamps in order to obtain a profit on the transaction. If this is so, then the reduction to the grocer’s gross income under *Kroger* will be greater than the value of the stamps distributed.

App. 2d 8, 164 P.2d 57 (1945)).

¹⁵453 N.E.2d at 1177.

¹⁶*Id.* at 1179.

¹⁷*Id.*

In any event, it would appear that the reduction against gross income for the payment of trading stamps to customers should be a value based upon the number of stamps distributed in the tax year to customers of the taxpayer. A logical value for reduction of the grocer's gross income amount would be based upon the redeemable face value of the trading stamps actually issued. This requirement might be more burdensome upon the taxpayer, but it is he who desires the reduction of his gross income tax liability. Furthermore, to permit a reduction based upon the taxpayer's payment to a trading stamp company ignores that the basis of this reduction is grounded in the fact that the stamps, when given to the customers, reduce "both the ultimate price paid by their recipients and the net proceeds received by [the taxpayer]." ¹⁸

In *United Artists Theatre Circuit, Inc. v. Indiana Department of State Revenue*,¹⁹ United Artists claimed that the portion of its receipts from film viewers which was paid to the film distributors was not subject to gross income tax because it had received this portion of the payments either on behalf of the distributor, or as a special agent merely collecting for the distributor. The Indiana Court of Appeals held that United Artists was subject to gross income tax on the entire amount of its receipts from movie patrons.²⁰

United Artists owns various theaters throughout Indiana at which it shows films to the general public. The rights to show these films during the years in question were acquired from third party film distributors under two types of licenses. In the first type of agreement, which was seldom used, United Artists paid a fixed charge to the distributor for the right to show a movie. The second and most common type of agreement provided that United Artists pay the film distributor a percentage of the gross receipts from admissions. United Artists was permitted under these agreements to reduce the payments to distributors for a "house allowance."²¹ The house allowance was usually based on a fixed dollar amount and was to compensate United Artists for its operating expenses.²² In those cases where no house allowance was deducted, a lesser percentage was paid to the film distributor for the right to show the film. The United Artists agreements which were based on percentage amounts sometimes contained trust clauses which stated that the percentage of the admissions payable to the distributor was held by United Artists in trust for the distributor.²³

At the outset, the court found that United Artists' argument was

¹⁸*Id.*

¹⁹459 N.E.2d 754 (Ind. Ct. App. 1984).

²⁰*Id.* at 758-59.

²¹*Id.* at 755-56.

²²*Id.* at 757.

²³*Id.*

“tantamount to claiming an exemption.”²⁴ Thus, the court held that the tax statutes would be strictly construed against the taxpayer since it was claiming an exemption.²⁵

The court agreed with United Artists’ first argument that receipts received on behalf of a third person do not subject the persons receiving such payments to the gross income tax.²⁶ However, United Artists was unsuccessful in convincing the appellate court that the trial court had erred in finding that United Artists was the owner of the entire admissions upon receipt. The court reviewed the trial court’s finding that the film agreements, while entitling the distributor to a percentage of the admissions, were more in the nature of a rental agreement which were business expenses of United Artists and unavailable for deduction from its gross income. The trial court had concluded that the provisions in the agreements ensuring its collection of the distributor’s percentage of admissions were merely a means of securing payment, and that these payments were expenses of United Artists in doing business.²⁷

The *United Artists* court referred to the Indiana Supreme Court case of *Gross Income Tax Division v. Warner Brothers*,²⁸ which concerned the question of whether or not Warner Brothers was engaged in interstate commerce and thus exempt from gross income tax. In *Warner Brothers*, the Indiana Supreme Court held that Warner Brothers was not engaged in interstate commerce: “[N]or can we see that the license agreement, providing for a percentage of the exhibitor’s admission price as the license fee, changes the character of the transaction.”²⁹ The *United Artists* court recognized that this was not a binding argument against United Artists, but it also recognized that this holding was valid as to the logic that a percentage of the exhibitor’s admission fee does not change the character of the transaction.³⁰

Reviewing the facts, the court indicated that the agreement’s provision entitling United Artists to a “house allowance” indicated that the parties

²⁴*Id.* at 756.

²⁵*Id.* (citing *Indiana Dep’t of State Revenue v. Boswell Oil Co.*, 148 Ind. App. 569, 268 N.E.2d 303 (1971)).

²⁶459 N.E.2d at 756-57 (citing *Indiana Dep’t of Revenue v. Waterfiled [sic] Mtg. Co.*, 400 N.E.2d 212 (Ind. Ct. App. 1980); *Department of Treasury v. Ice Serv., Inc.*, 220 Ind. 64, 41 N.E.2d 201 (1942)).

²⁷459 N.E.2d at 757.

²⁸233 Ind. 345, 118 N.E.2d 117 (1954).

²⁹*Id.* at 348, 118 N.E.2d at 119.

³⁰459 N.E.2d at 757 n.2. The court in this footnote revealed that United Artists had contended that the Department of Revenue should not be allowed to rely on *Warner Brothers* because this case had been repudiated by later Department of Revenue regulations. The court conceded this was correct; however, the fact that this holding was now contrary to Department of Revenue regulations did not supersede the reasoning of *Warner Brothers*, at least to the extent that it commented upon a percentage of license agreement and its change upon the character of the transaction.

treated the entire admission fees as gross income, since all calculations were made on the total admissions after deduction for "the house allowance."³¹ Moreover, United Artists had not segregated that percentage of fees which was payable to the distributors into a separate banking account, but rather paid it from its own accounts.³² The court made no mention of what effect segregation of funds might have had upon the outcome of this case.

United Artists also claimed that the portion of admissions received and eventually paid to the movie distributors had been received as a special agent for the distributor.³³ United Artists argued it was merely a collection agent for the distributors due to the requirement that special prenumbered tickets be utilized and because the distributor had a right to audit records of United Artists and monitor theater premises.³⁴ The distributor also retained many rights regarding the actual showing of the films and almost total control of advertising related to the films. The trial court, however, found nothing in the licensing agreements indicating that United Artists was an agent for the distributors for any purpose and that any allegations of agency were uncorroborated.³⁵

The court of appeals found *United Artists* distinguishable from *Indiana Department of Revenue v. Waterfiled [sic] Mortgage Co.*,³⁶ where it was held that a mortgage company collecting mortgage payments and transferring those amounts, which included interest, to the appropriate bank was merely a conduit and not subject to gross income tax. Furthermore, the court denied United Artists' claim that it was a special agent, because the real nature of the agreements revealed that they were rental agreements which based the payment to the film distributor upon a percentage of the receipts from admission.³⁷

The final issue in *United Artists* was whether or not the trial court's scope of review was limited to the facts presented to the Department of Revenue in administrative hearings. The trial court had held that the scope of its review was limited to facts presented to the Department and that the facts found by the Department were presumed to be valid.³⁸ United Artists argued, and the appellate court agreed, that a taxpayer's claim for gross income tax refunds was to be held de novo upon trial.³⁹ However, since United Artists failed to show any evidence was excluded by the trial court nor did it offer to prove evidence which had been

³¹*Id.* at 758.

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶400 N.E.2d 212 (Ind. Ct. App. 1980).

³⁷459 N.E.2d at 759.

³⁸*Id.*

³⁹*Id.*

excluded, the court concluded that the trial court's finding constituted harmless error.⁴⁰

C. Inheritance Tax

The issue in *In re Estate of Pfeiffer v. Henry*⁴¹ was the manner in which the estate was permitted to allocate inheritance tax deductions. The decedent's will provided that expenses were to be paid from the residuary assets of the estate. The estate's expenses consumed assets so as to leave no residual properties and no abatement⁴² of a portion of specific devises.⁴³ For purposes of inheritance tax, the estate proportionately allocated the estate's expenses⁴⁴ among all the assets of the estate. The Department of Revenue objected, claiming that the expenses should be directly allocated to those assets which were reduced pursuant to the provisions of the decedent's will.⁴⁵

The court held that the estate's method of apportionment was incorrect because "[l]ogic dictates that a deduction must be attributed only to the party which expends the resources which constitute the deduction."⁴⁶ In so holding, the court found that a deduction should be treated under the same standard as an exemption, which is to construe any ambiguity in the law against the party claiming the exemption.⁴⁷

In *Indiana Department of State Revenue v. Estate of Broyles*,⁴⁸ the estate did not pay the inheritance tax within the required eighteen month time period from the date of the decedent's death. This resulted in the imposition of a ten percent interest penalty on the delinquent portion of the inheritance tax from the date of death until the time of payment.⁴⁹ The probate court's final determination of the inheritance tax in the amended Order Determining Value of Estate and Amount of Tax added ten percent

⁴⁰*Id.* at 759-60.

⁴¹452 N.E.2d 448 (Ind. Ct. App. 1983)

⁴²The abatement of the decedent's residual bequest and specific devise was made pursuant to Indiana Code section 29-1-17-3. There was no controversy as to whether the abatement had been made pursuant to statutory requirements.

⁴³452 N.E.2d at 450.

⁴⁴Indiana Code section 6-4.1-3-13(b) provides the applicable language for the deduction of estate expenses for inheritance tax purposes: "The following items, and no others, may be deducted from the value of property interests transferred by a resident decedent under his will, under the laws of intestate succession, or under a trust" IND. CODE § 6-4.1-3-13(G) (1982).

⁴⁵452 N.E.2d at 451.

⁴⁶*Id.*

⁴⁷*Id.* at 452.

⁴⁸457 N.E.2d 250 (Ind. Ct. App. 1983).

⁴⁹*Id.* at 252. Interest on the tax runs from the date of death until payment is actually made.

interest charge⁵⁰ to the delinquent tax due.⁵¹ Ten months following the amended order, the estate petitioned for a reduction of the penalty interest from ten percent to ten percent pursuant to Indiana Code section 6-4.1-9-1(b),⁵² which permits the probate court to grant a reduction if an unavoidable delay prevented the determination of the amount of the inheritance tax due.

The probate court granted the estate's request for reduction.⁵³ The Department of Revenue objected to this reduction in interest on one ground; it claimed that the petition requesting the reduction in interest rate was not filed within the ninety day period required by statute⁵⁴ for filing a petition for rehearing with a probate court after the determination of an inheritance tax has been made.⁵⁵

The court of appeals held that a petition for reduction of interest is within the ambit of the ninety day requirement for filing and that failure to file within the statutory period deprived the probate court of subject matter jurisdiction over the reduction in interest.⁵⁶ The court addressed the issue of whether or not the statute containing the ninety day restriction for objecting to an "inheritance tax determination" includes a petition for the reduction of interest.⁵⁷ The term "determination" was held to mean consideration by the court of any factor relating to

⁵⁰Indiana Code section 6-4.1-9-1(a) provides that if the tax remains unpaid eighteen months after the decedent's death, then a 10% interest rate is imposed on the delinquent portion of the tax from the date of death until the payment is made. IND. CODE § 6-4.1-9-1 (1982).

⁵¹457 N.E.2d at 251.

⁵²Indiana Code section 6-4.1-9-1(b) provides:

If an unavoidable delay, such as necessary litigation, prevents a determination of the amount of inheritance due, the appropriate probate court, in the case of a resident decedent, or the department of state revenue, in the case of a non-resident decedent, may reduce the rate of interest imposed under this section, for the time period beginning on the date of the decedent's death and ending when the cause of delay is removed, to six percent (6%) per year.

IND. CODE § 6-4.1-9-1(b) (1982).

⁵³457 N.E.2d at 252.

⁵⁴Indiana Code section § 6-4.1-7-1 provides:

A person who is dissatisfied with an inheritance tax determination made by a probate court with respect to a resident decedent's estate may obtain a rehearing on the determination. To obtain the rehearing, the person must file a petition for rehearing with the probate court within ninety (90) days after the determination is made. In the petition, the person must state the grounds for the rehearing. The probate court shall base the rehearing on evidence presented at the original hearing plus any additional evidence which the court elects to hear.

IND. CODE § 6-4.1-7-1 (1982).

⁵⁵457 N.E.2d at 252.

⁵⁶*Id.* at 253.

⁵⁷*Id.* at 252.

the manner of which the amount of tax is ultimately computed, including an interest reduction.⁵⁸

The court observed that the order of the probate court granting the reduction in interest was not restricted to that period prior to the final determination of the tax.⁵⁹ While the court noted this conclusion was incorrect because the statutory language⁶⁰ permits reduction in interest for only that period prior to the determination of the tax and not for the period after the determination of tax and before payment, it indicated that this error alone was not fatal and could have been modified upon appeal.⁶¹

In *Indiana Department of State Revenue v. Estate of Rogers*,⁶² the inheritance tax had been paid within one year of the decedent's death but additional inheritance taxes, along with interest at the statutory rate of ten percent per annum, were later determined after a federal estate tax audit.⁶³ The estate immediately paid an amount equal to the additional inheritance tax determined to be due. The estate also filed a petition to determine the interest due on this additional inheritance tax and for a reduction of the interest rate from ten percent to six percent.⁶⁴ The probate court ordered the estate to pay interest on the additional inheritance tax at a rate of ten percent from the date of the decedent's death until the tax was finally paid.⁶⁵ Based upon this order, the estate computed and paid the interest. In computing interest due, the estate assumed that its first additional payment was applied first against the principal of the tax due and any remainder constituted interest on the tax.⁶⁶

The probate court ultimately determined that the estate had properly calculated the application of the payment to principal and interest. Further, it found that the Department of Revenue, having failed to file objections to the court's later order which confirmed the estate's calculations, had waived its right to file objections because of the statutory ninety day limitation⁶⁷ on filing petitions for the redetermination of tax.⁶⁸

⁵⁸*Id.* at 253 (citing *In re Estate of Hogg*, 150 Ind. App. 650, 276 N.E.2d 898 (1971)). The court noted that the *Hogg* decision was based upon the pertinent statute prior to its current amendment; however, the court found the *Hogg* analysis retained its applicability in the setting of the existing case. 457 N.E.2d at 252-53.

⁵⁹457 N.E.2d at 252.

⁶⁰The pertinent portion of Indiana Code section § 6-4.1-9-1(b) provides: "[T]he appropriate probate court . . . may reduce the rate of interest imposed under this section, for the time period beginning on the date of the decedent's death and *ending when the cause of delay is removed*" IND. CODE § 6-4.1-9-1(a) (1982) (emphasis added).

⁶¹457 N.E.2d at 252.

⁶²459 N.E.2d 69 (Ind. Ct. App. 1984).

⁶³*Id.* at 70.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷See *supra* note 54.

⁶⁸459 N.E.2d at 70.

On appeal, the Department of Revenue contended that the later payments of tax should have been first applied to interest due at the time of payment and that any remainder should have been applied to the principal of the inheritance tax due. It also claimed that since its motion was in the nature of a motion to compel compliance with the court's original determination of tax, its failure to file within the ninety day period did not deprive the court of subject matter jurisdiction. It argued that the motion was not within the realm of the statute limiting the time for filing a petition for rehearing and redetermination of inheritance tax.⁶⁹

The court agreed with the Department of Revenue that payments made when both inheritance tax and interest are due must be applied first to the interest due, and then only after full payment of the interest is applied, to the principal of the tax due.⁷⁰ The Department of Revenue's interpretation followed the laws of Indiana and the United States, which generally require payments made without an agreement or statute to the contrary be first applied to interest; then, if any remains, to the reduction of principal.⁷¹

The court also held that the Department of Revenue's motion to compel compliance with the court's original redetermination of additional inheritance tax did not come within the ninety day requirement for filing. This was so because the statute is limited in its application to those cases where the Department of Revenue is "*dissatisfied* with the inheritance tax determination."⁷²

The court also quickly disposed of the estate's argument that an oral agreement estopped the Department. The court held that since there was no evidence of an oral agreement in the record there was no need to consider whether an estoppel could even be asserted against the Department.⁷³

Whether or not the mailing of an inheritance tax payment by United States certified mail, return receipt requested, two days prior to the due date constituted a timely payment of inheritance tax was the question posed to the court in *Nell v. Tracy*.⁷⁴ The facts in *Nell* were undisputed. Two days prior to the due date of the inheritance tax, the estate's attorney sent a check by certified mail, return receipt requested, in the correct amount of tax due and payable, to the Indiana Department of

⁶⁹*Id.*

⁷⁰*Id.* at 70-71 (citing 45 IND. ADMIN. CODE 4-6-6 (1984); 1962 Op. Att'y Gen. No. 73, 79).

⁷¹459 N.E.2d at 71 (citing *Jacobs v. Ballenger*, 130 Ind. 231, 29 N.E. 782 (1892) among many other authorities).

⁷²459 N.E.2d at 71.

⁷³*Id.* at 72.

⁷⁴459 N.E.2d 432 (Ind. Ct. App. 1984).

State Revenue at its proper address and to the proper person.⁷⁵ The check was mailed from the United States Post Office in Vincennes, Indiana. According to the testimony of the postmaster of the Vincennes Post Office, a letter mailed in such a manner would normally be delivered overnight to the proper address in Indianapolis. The check was not received until four days past the due date.⁷⁶ The Department of Revenue contended payment was not timely, causing interest charges to accrue from the date of decedent's death until the time of payment.⁷⁷

The Inheritance Tax Division argued that the post office was the agent of the sender because it could withdraw the letter prior to delivery and, therefore, it was not until delivery that the payment was made.⁷⁸ The evidence in *Nell* did establish that the estate could have withdrawn the payment from the mail but, nonetheless, the court held that payment was made upon mailing.

The court relied upon decisions from other jurisdictions⁷⁹ for the proposition that the purpose of penalties upon late payment of tax was to penalize those who were careless in their payment of tax and that the penalty should not be imposed where persons mailed taxes in a manner which would normally result in a timely payment.⁸⁰ The estate had done what any reasonable person in normal business practice would have done, which was to make timely payment of the tax on or before the due date.⁸¹ The court concluded that the Department of Revenue's position was grossly unfair and wrong, dictating a finding in favor of the estate.⁸² The holding in *Nell* prevents an unjust result to a taxpayer which, as the court noted, could have done little more to ensure timely payment short of personal delivery.

Another Indiana appellate court, in considering whether the filing

⁷⁵*Id.* at 433.

⁷⁶*Id.*

⁷⁷*Id.* at 433 n.4. The Department of Revenue contended that based upon the holding in *Estate of Rogers*, see *supra* notes 62-73 and accompanying text, the payment would be applied first against interest due and the remaining against principal. Application of the *Rogers* decision would have resulted in a sizeable sum of unpaid principal of inheritance tax which would have drawn interest pending the outcome of the ultimate determination of the timeliness of the payment.

⁷⁸459 N.E.2d at 434 (citing *Guardian Nat'l Bank v. Huntington County State Bank*, 206 Ind. 185, 187 N.E. 388 (1933)).

⁷⁹459 N.E.2d at 434. The court first cited *Hills Materials Co., Inc. v. Van Johnson*, 316 N.W.2d 646 (S.D. 1982), which permitted a taxpayer to go unpenalized when he was able to establish he had mailed his tax payment three days prior to the due date. The second case cited by the court for this proposition was *General Petroleum Corp. v. Smith*, 62 Ariz. 239, 157 P.2d 356 (1945).

⁸⁰459 N.E.2d at 434.

⁸¹*Id.*

⁸²*Id.* at 435.

of an appeal of property tax assessment was timely, has recently reached a different conclusion about the effect of filing by mail.⁸³ This may indicate that a decision from the Indiana Supreme Court would be appropriate to resolve this conflict between the appellate courts, or that the imposition of a penalty deserves a special exception in the law. In either case, the interests of Indiana taxpayers would be best served by a statutory enactment. A more favorable solution would be a statute which prescribes that the mailing of these items would be effective at the date of the postmark. This would comport with an endless list of statutes and trial rules which permit federal and state tax payments and pleadings regarding tax matters to be effective upon proper mailing with the United States Post Office. Moreover, effectiveness upon mailing offers a desirable certainty which is not otherwise practically obtainable.

In *Indiana Department of State Revenue v. Estate of Smith*,⁸⁴ the question was whether or not the survivor of the decedent was entitled to a deduction, for inheritance tax purposes, for payment of the decedent's funeral expenses and the estate's administrative expenses.⁸⁵ The survivor and the decedent were joint tenants with full rights of survivorship to a bank account. Indiana's statute⁸⁶ does not permit deductions for payment by a survivor of a joint bank account if the assets of the decedent's estate are sufficient to pay the debts or funeral expenses. The value of the assets in the estate were sufficient to pay these expenses, but were not used because the assets were not readily convertible into an acceptable form of payment for these expenses.⁸⁷

The court held that the payments by the holder of a joint survivor account could not be claimed as deductions simply because the estate lacked the liquidity to make the payments eventually made by the joint survivor. Because the statute was clear and unambiguous, the court could not substitute language which it felt the legislature may have intended.⁸⁸

D. Property Tax

In *Margrat, Inc. v. Indiana State Board of Tax Commissioners*,⁸⁹

⁸³See *Margrat, Inc. v. Indiana State Bd. of Tax Comm'rs*, 448 N.E.2d 684 (Ind. Ct. App. 1982). See *infra* notes 89-99 and accompanying text.

⁸⁴460 N.E.2d 1263 (Ind. Ct. App. 1984).

⁸⁵*Id.* at 1264.

⁸⁶Indiana Code section 6-4.1-3-14 provides in pertinent part: "[T]he amount of the decedent's debts or funeral expenses paid by a surviving joint owner of property held jointly with the decedent may be deducted from the value of the jointly held property if the assets of decedent's estate are insufficient to pay the debts or funeral expenses." IND. CODE § 6-4.1-3-14 (1982).

⁸⁷460 N.E.2d at 1265.

⁸⁸*Id.* (citing *State ex rel. Southern Hills Mental Health Center, Inc. v. Dubois County*, 446 N.E.2d 996 (Ind. Ct. App. 1983)).

⁸⁹448 N.E.2d 684 (Ind. Ct. App. 1982).

a taxpayer received an adverse determination by the State Board of Tax Commissioners regarding the assessed value of the taxpayer's property. The taxpayer mailed its notice of appeal by registered mail, return receipt requested, exactly thirty days following the date of the adverse determination. Three days later the State Board received the notice of intent to appeal.⁹⁰ The State Board moved to dismiss this appeal on the ground that the notice had not been filed within the thirty day statutory requirement for filing.⁹¹

An appeal from the State Board of Tax Commissioners is permitted by statute⁹² if written notice is made within thirty days after the board gives notice of its final determination to the taxpayer.⁹³ The statute also expressly provides that notice is effected upon the taxpayer on the day on which the notice is deposited in the United States mail.⁹⁴

In *Margrat*, the court rejected the taxpayer's argument that the Indiana Trial Rules should be applied to make a filing effective upon mailing by registered or certified mail and to add three days to a prescribed period when notice is mailed to a party.⁹⁵ Instead, the court found *Weatherhead Co. v. State Board of Tax Commissioners*⁹⁶ controlling which interpreted the predecessor statute to the current provision for the filing of written notice with the Board.⁹⁷ In *Weatherhead*, the court found that the term "filing" meant the actual delivery of the document to the proper office and its receipt by the proper official.⁹⁸ Since the language of the existing statute had not been changed in meaning from that interpreted in *Weatherhead*, the court held that notice of an appeal of a determination by the Board must be received within the thirty day period in order to be an effective notice of an appeal.⁹⁹

⁹⁰*Id.* at 685.

⁹¹*Id.*

⁹²Indiana Code section 6-1.1-15-5 provides in pertinent part:

(b) If a person desires to initiate an appeal of the state of board of tax commissioners' final determination, he shall:

(1) file a written notice with the state board of tax commissioners informing the board of his intention to appeal . . . ;

. . . .

(c) To initiate an appeal under this section a person must take the action required by subsection (b) of this section within thirty (30) days after the board gives him notice of its final determination.

IND. CODE § 6-1.1-15-5 (1982).

⁹³448 N.E.2d at 685.

⁹⁴IND. CODE § 6-1.1-36-1 (1982).

⁹⁵448 N.E.2d at 685.

⁹⁶151 Ind. App. 680, 281 N.E.2d 547 (1972).

⁹⁷448 N.E.2d at 685.

⁹⁸*Id.* at 686 (citing *Weatherhead*, 151 Ind. App. at 684, 281 N.E.2d at 550).

⁹⁹448 N.E.2d at 686.

E. Sales Tax

The Supreme Court of Indiana settled much of the confusion surrounding the interpretation of the "double direct" language contained within the sales tax exemption in its decisions in *Indiana Department of State Revenue v. Cave Stone, Inc.* and *Indiana Department of State Revenue v. Meshberger Stone, Inc.*¹⁰⁰ This language provides for a sales tax exemption for the purchase of certain equipment "to be *directly* used by the purchaser in the *direct* production . . . of . . . tangible personal property."¹⁰¹ In *Cave Stone*, the court considered the purchase of equipment which was used to transport stone from quarry to crusher and from crusher to stockpiles. The supreme court held that this equipment was "directly used" in the "direct production" of the companies' stone product and was thereby exempt from the gross retail tax, or sales tax. The supreme court accepted transfer of these cases in order to resolve the conflict in interpretation of the statute.¹⁰²

The case arose upon separate complaints filed by Cave Stone, Inc. and Meshberger Stone, Inc. (the "Companies"). The supreme court found the issues in both cases to be identical and having been treated as such in one appeal, it considered them together in its single decision. Only one issue¹⁰³ was considered and resolved by the supreme court: whether or not the machinery, parts, and related items used by the Companies in hauling crude stone were directly used by the Companies in the direct production, manufacture, mining, processing, or finishing of tangible personal property.¹⁰⁴

The Companies were in the business of selling sized, aggregate stone after its removal from their quarries. The preparation of the stone for sale involved several processes. The crude stone was stripped, drilled, blasted, and then loaded onto trucks which hauled it to a primary crusher. The stone was then crushed, separated, washed, and screened into various grades of aggregate stone. The stone was next taken by conveyor to a loader for loading onto trucks for transport to separate stockpiles, referred to as "stock out," from which it was eventually sold. The stockpiling not only preserved the grading of the stone and prevented commingling, but also allowed moisture to drain from the

¹⁰⁰457 N.E.2d 520 (Ind. 1983). Because these two cases were combined by the Indiana Supreme Court and decided upon the basis of the same issue, both are referred to when the case name "*Cave Stone*" is used.

¹⁰¹IND. CODE § 6-2-1-39(b)(6) (1976) (recodified at IND. CODE § 6-2.5-5-3 (1982) (emphasis added)).

¹⁰²For a more complete discussion of this controversy, see King, *Taxation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 409, 413 (1982).

¹⁰³A second issue presented for determination was whether or not the Companies were subject to penalties. Due to the ultimate disposition of this case, it was not necessary to decide this issue. 457 N.E.2d at 527.

¹⁰⁴*Id.* at 521.

washed stone to obtain a moisture level at a standard generally acceptable to stone purchasers.¹⁰⁵ The trial court found that the transportation of the materials prior to their final disposition in stock out was prior to the stone being in its “final, most marketable form” because the stock out step also constituted a part of the production, the necessary drainage of the stockpiles.¹⁰⁶ The trial court also concluded the stock out step constituted transportation of unfinished work, a part of the continuous flow of the production of the stone.¹⁰⁷

Section 6-2-1-39(b)(6) of the Indiana Code which was the pertinent statute for the years in controversy provided in part: “Nor shall the state gross retail tax [sales tax] apply to any of the following transactions: Sales of manufacturing machinery, tools and equipment to be directly used by the purchaser in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining or finishing of tangible personal property. . . .”¹⁰⁸ The court of appeals, in arriving at its decision against the taxpayer, had concluded that the various categories contained in the above statute were exclusive of one another and that “to the extent a particular procedure falls within a definite exemption category that category is exclusive. . . .”¹⁰⁹ The majority of the appellate court then found that the appropriate category in the case at bar was the term “processing,” which requires an operation placing the product in a different form, composition, or character. Next, the majority found that because the hauling of the crude stone and the stock out were steps which did not alter the form, composition, or character of the stone, these were steps not directly used in the direct processing of the stone.¹¹⁰ Upon rehearing, the court of appeals also determined that the equipment was not used in the direct “production” of stone. Further, to be exempt from the sales tax the manufacture and equipment would have to have a transformational effect as opposed to a translational effect.¹¹¹

In *Cave Stone*, the supreme court recognized that exemption statutes were to be strictly construed against the taxpayer,¹¹² but found that the

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 523.

¹⁰⁷*Id.*

¹⁰⁸IND. CODE § 6-2-1-39(b)(6) (1976) (recodified at IND. CODE § 6-2.5-5-3 (1982)).

¹⁰⁹457 N.E.2d at 524 (quoting *Indiana Dep't of State Revenue v. Cave Stone, Inc.*; *Indiana Dep't of State Revenue v. Meshberger Stone, Inc.*, 409 N.E.2d 690, 695 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 520 (Ind. 1983)).

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.* (citing *Gross Income Tax Div. v. National Bank & Trust Co.*, 226 Ind. 293, 298, 79 N.E.2d 651, 653 (1948); *Conklin v. Town of Cambridge City*, 58 Ind. 130, 133 (1877)).

court of appeals had too narrowly construed this statute against the taxpayer. Specifically, the supreme court found that the exemption provisions were not mutually exclusive but provided a comprehensive description of various means of "production."¹¹³ The supreme court cited with approval Judge Buchanan's dissent in the appellate court decision in which he provided two definitions of "production."¹¹⁴ The supreme court concluded that the statute envisioned all of the operations or processes by which the finished product was derived. Thus, the supreme court reasoned that the production or processing of stone begins at the time of the initial stripping, drilling, and blasting at the quarry and ends at the time the stone is stockpiled. Further, the production process was continuous and indivisible.¹¹⁵

The supreme court found that the transportation in question was "essential to the achievement of a transformation of the crude stone into aggregate stone" and that it "played an integral part in the ongoing process of transformation."¹¹⁶ Therefore, the supreme court held that the equipment was directly used by the Companies in direct production, manufacturing, mining, processing, or finishing of tangible personal property within the meaning of the exemption.¹¹⁷

In the course of explaining its reasoning, the supreme court defined the term "direct" production: "direct" production turned on whether or not the transportation was an integral element in the production or processing of the aggregate stone. It did not matter whether any transformation occurred during the transportation of the stone; rather, because the trucks were "essential to the achievement of a transformation of the crude stone into aggregate stone," the equipment was used in the direct production.¹¹⁸

¹¹³457 N.E.2d at 524.

¹¹⁴*Id.* The definitions of the word production cited by Chief Judge Buchanan and incorporated in *Cave Stone* were the following:

"In an economic sense, production includes all activity directed to increasing the number of scarce economic goods. It is not simply the manual, physical labor involved in changing the form or utility of a tangible article. . . . Production: something that is produced naturally or as a result of labor and effort; the act or process of producing, bringing forth or making; the creation of utility, the making of goods available for human wants."

Id. (quoting *Indiana Dep't of State Revenue v. Cave Stone, Inc.*; *Indiana Dep't of State Revenue v. Meshberger Stone, Inc.*, 409 N.E.2d 690, 698 (Ind. Ct. App. 1980) (Buchanan, C.J., concurring in part and dissenting in part) (quoting *Borden Co. v. Borella*, 325 U.S. 679, 683 (1945); WEBSTER'S THIRD LAW INT'L DICTIONARY 1810 (unabridged ed. 1971), *Cave Stone vacated*, 457 N.E.2d 520 (Ind. 1983)).

¹¹⁵457 N.E.2d at 527.

¹¹⁶*Id.*

¹¹⁷*Id.*

¹¹⁸*Id.*

While the supreme court spent much time defining and explaining the term “direct production,” it gave only a cursory review to the phrase “directly used by the purchasers”:

The statute provides that the manufacturing machinery, tools and equipment, in order to be exempt, must (1) be directly used by the purchaser and (2) be used in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining or finishing of tangible personal property. *In the present case, the transportation equipment in question was directly used by the purchaser, not some other entity*, and it was used in the direct production and processing of crude stone into aggregate stone.¹¹⁹

The supreme court appears to have changed the “double direct” test to a single direct test by defining “directly used by the purchaser” as used by the purchaser and “not some other entity.”

The court followed its conclusion with a review of the various Indiana appellate court decisions which have interpreted this exemption.¹²⁰ A look at each of these cases reviewed by the Indiana Supreme Court is instructive because it indicates the supreme court’s analysis in other factual settings.

One case discussed in *Cave Stone* was *Department of Revenue v. United States Steel Corp.*¹²¹ The court found the *United States Steel* analysis was correct in interpreting that “direct” production requires the equipment in question to have an “immediate link with the product being produced.”¹²² The supreme court also noted that the *United States Steel* analysis correctly concluded that the focus should be on whether the equipment was an “integral part of manufacturing and operates directly on the product during production.”¹²³ The supreme court stated that it had been held in *United States Steel* that safety equipment was essential, integral, and in direct production, for the employees could not complete the production process without the equipment.¹²⁴

The court in *Cave Stone* also affirmed the analysis in *Indiana Department of State Revenue v. American Dairy of Evansville, Inc.*¹²⁵ In *American Dairy* it was held that milk cans used to hold, measure, and convey raw materials were available for exemption from the sales

¹¹⁹*Id.* at 525 (emphasis added).

¹²⁰*Id.* at 525-26

¹²¹425 N.E.2d 659 (Ind. Ct. App. 1981).

¹²²457 N.E.2d at 525 (quoting *Department of Revenue v. United States Steel Corp.*, 425 N.E.2d 659, 662 (Ind. Ct. App. 1981)).

¹²³457 N.E.2d at 525 (quoting *Department of Revenue v. United States Steel Corp.*, 425 N.E.2d 659, 664 (Ind. Ct. App. 1981)).

¹²⁴457 N.E.2d at 525.

¹²⁵167 Ind. App. 367, 338 N.E.2d 698 (1975), *transfer denied*, July 14, 1976.

tax.¹²⁶ In *Cave Stone*, the supreme court stated that the majority of the appellate court had incorrectly distinguished *American Dairy* on the ground that the processing of the milk occurred while the milk was in the cans while no processing of the stone occurred during transport in *Cave Stone*.¹²⁷ The supreme court noted that the trial court in *American Dairy* had found that the containers were used only to "hold, measure and convey."¹²⁸ It was further noted that the court of appeals in *American Dairy* had permitted the exemption for the milk containers without requiring any transformation in the milk while stored in the containers.¹²⁹

The holding in *Indiana Department of State Revenue v. RCA Corp.*¹³⁰ was also found to be consistent with the holding in *Cave Stone*. The court in *RCA* held that air conditioning equipment in an RCA plant was not directly used in direct production of color television picture tubes. The court recognized the importance of the air conditioning to the production, but found that the production could continue without the air conditioning even though it would be done in a less economic manner. This was found to be distinguishable from *Cave Stone* in which the equipment to transport the stone to the crusher and to the stockpiles was essential to the production of the aggregate stone.¹³¹ The supreme court did not address the fact that in *RCA* the Department of Revenue had conceded that the controlled environment was "integral and essential" to RCA,¹³² which suggests that *RCA* may have been closer to an exemption than the supreme court admitted.

The supreme court also concluded that its instant opinion was consistent with the holding in *Indiana Department of State Revenue v. Harrison Steel Castings Co.*¹³³ In *Harrison*, safety equipment was found not to be eligible for the sales tax exemption because, according to the supreme court, it was not so essential to the production that its removal would have halted production.¹³⁴

In *Cave Stone*, the court also addressed the effect of the Department's regulations. The Department of Revenue argued that a different result might have occurred had this case been brought under the later, and now existing, regulations. The supreme court, however, clearly stated that

¹²⁶*Id.* at 375, 338 N.E.2d at 702.

¹²⁷457 N.E.2d at 526.

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰160 Ind. App. 55, 310 N.E.2d 96 (1974), *transfer denied*, Oct. 13, 1976.

¹³¹457 N.E.2d at 526.

¹³²160 Ind. App. at 58, 310 N.E.2d at 98.

¹³³402 N.E.2d 1276 (Ind. Ct. App. 1980).

¹³⁴457 N.E.2d at 526.

to the extent any regulation was inconsistent with the holding in *Cave Stone*, it would be contrary to the enabling statute and invalid to that extent.¹³⁵ Therefore, it appears quite clear that *Cave Stone* is, and will continue to be, the seminal case in the field of exemption from sales tax for the purchase of equipment to be directly used by the purchaser in the direct production of tangible personal property in Indiana.

Nevertheless, *Cave Stone* will not end the search for a test which will clearly identify equipment used in “direct” production, as there will continue to be an endless need for application of whether an item constitutes “an integral and essential part of production.” Rather, the great importance of *Cave Stone* is that it has decisively put to rest the Department’s argument that to qualify for the sales tax exemption an item must actually touch or have a direct positive effect upon the item produced.

In *Indiana Department of State Revenue v. Hertz Corp.*,¹³⁶ Hertz sought an exemption from the sales tax for its gasoline purchases. Hertz claimed that the purchase of that portion of its gasoline which it sold to its customers was not subject to sales tax because its purchase was a wholesale purchase for resale to its customers,¹³⁷ and because it was a purchase for the purpose of reselling the same goods in the form in which they were purchased.¹³⁸

Hertz established that it generally entered into two types of rental agreements. The first type of agreement was a “wet rental” agreement in which all the fuel was provided by Hertz and a higher charge was paid by the customer because the fuel was provided. Under the “wet rental” agreements, the entire price of the rental was subjected to sales

¹³⁵*Id.* at 527.

¹³⁶457 N.E.2d 246 (Ind. Ct. App. 1983).

¹³⁷The previous code section provided: “The term ‘wholesale sales’ means and includes only the following: (1) Sales of any tangible personal property . . . to a purchaser who purchases the same for the purpose of reselling it in the form in which it is sold to him” IND. CODE § 6-2-1-3(a) (1976) (recodified at IND. CODE § 6-2.5-4-2(b) (1982)). This provision is now found at Indiana Code section 6-2.5-4-2(b) which provides, for purposes of this discussion, that a person is making wholesale sales when he “(1) sells tangible personal property, other than capital assets or depreciable property, to a person who purchases the property for the purpose of reselling it without changing its form.” IND. CODE § 6-2.5-4-2(b) (1982)

¹³⁸The previous code section provided: “(b) Nor shall the state gross retail tax [sales tax] apply to . . . (9) Sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling in the regular course of the purchaser’s business such tangible personal property in the form in which it is sold to such purchaser.” IND. CODE § 6-2-1-39(b)(9) (1976) (recodified in IND. CODE § 6-2.5-5-8 (1982)). This provision is now included at Indiana Code section 6-2.5-5-8: “Transactions involving tangible personal property are exempt from the state gross retail tax [sales tax] if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property.” IND. CODE § 6-2.5-5-8 (1982).

tax which was collected and remitted to the Department of Revenue.¹³⁹ The second type of rental agreement used by Hertz was a "dry rental" agreement, in which the customer was required to pay Hertz if the vehicle were returned to Hertz with less than a full tank of gasoline. In the case of these "dry rental" agreements, the bill to the customer would segregate his charge into two separate categories: the additional charge for the fact that the car had been returned with less than a full tank of gasoline, and the normal rental charge based upon the mileage and time of the rental of the vehicle. Sales tax was collected on both categories of the customer's bill and timely remitted to the Department of Revenue.¹⁴⁰

Hertz objected only to the collection of sales tax upon its bulk purchases of fuel which in turn were used by its customers under both the dry and wet rental agreements. The court agreed with Hertz that its customers had separately paid for the gasoline supplied by Hertz by either the higher charge placed on them in the case of "wet rental" agreements or by a separate charge in the case of "dry rental" agreements.¹⁴¹ This qualified the bulk purchase of gasoline by Hertz as an exempt purchase under the statutory exemption of purchases for resales.¹⁴² Although Hertz suggested several alternatives to support its argument, the court relied solely upon this exemption and did not consider the adequacy of other arguments.¹⁴³

In *Indiana Department of State Revenue v. Indiana Harbor Belt Railroad*,¹⁴⁴ the court of appeals interpreted the sales tax exemption containing the so-called "single-direct" standard.¹⁴⁵ In *Harbor Belt*, the railroad argued that the purchase of the following items were exempt from the sales tax by virtue of being directly used or consumed for the rendering of public transportation: tools and equipment used to repair and maintain rolling stock and track; items used for repair and maintenance of the railroad's buildings; vehicles (other than locomotives or rolling stock) used primarily for transportation of track maintenance crews; items used for repairs and maintenance of those vehicles; and

¹³⁹457 N.E.2d at 247.

¹⁴⁰*Id.*

¹⁴¹*Id.* at 249-50.

¹⁴²IND. CODE § 6-2-1-39(b)(9) (1976) (recodified at IND. CODE § 6-2.5-5-8 (1982)). See *supra* note 138.

¹⁴³457 N.E.2d at 247.

¹⁴⁴460 N.E.2d 170 (Ind. Ct. App. 1984).

¹⁴⁵The former relevant Indiana Code section provided the following exception from sales tax: "The sale, storage, use or other consumption in this state of tangible personal property or service which is directly used or consumed in the rendering of public transportation of persons or property." IND. CODE § 6-2-1-39(b)(4) (1976) (recodified at IND. CODE § 6-2.5-5-27 (1982)). The current code provides the following exemption: "Transactions involving tangible personal property and services are exempt from the state gross retail tax [sales tax], if the person acquiring the property or service directly uses or

items used in general administrative and managerial operations such as office equipment, uniforms, and locks and keys.¹⁴⁶

While the court recognized the literal distinction between the “single-direct” standard contained in the law in issue, it indicated that the holding by the Indiana Supreme Court in *Cave Stone*¹⁴⁷ adopted a test which did not require a reference to the single or double directness language of the statutes. The court in *Harbor Belt* interpreted *Cave Stone* as necessitating an examination of the integrated process of manufacturing and establishing an “immediate link with the product being produced.”¹⁴⁸ Further, the holding in *Cave Stone* was found applicable to the statute containing the “single-direct” standard by analogy.¹⁴⁹ The court stated that the test to be applied, based on *Cave Stone*, is to consider the “particular item’s relation to full, continuous and indivisible production process, not whether an item . . . has a transformational effect on the end product.”¹⁵⁰

The only previous Indiana case interpreting the “single-direct” requirement in controversy was *Indiana Department of State Revenue v. Indianapolis Transit System, Inc.*¹⁵¹ In *Indianapolis Transit*, the court applied the test of whether the purchased items had a “necessity towards operations.”¹⁵² The court in *Harbor Belt* felt that this approach by the court in *Indianapolis Transit* did not vary much, if at all, from the approach adopted in *Cave Stone*.¹⁵³ The only difference the court noted between the cases was the distinction between what is an integral part of manufacturing as compared to what is an integral part of rendering transportation. The court noted that the latter concept, “an integral part of rendering transportation,” was a broader concept.¹⁵⁴

The *Harbor Belt* court went on to find that all of the contested items were exempt from the sales tax under the reasoning enunciated in *Cave Stone*.¹⁵⁵ These were found to be within the concept of a “direct use or consumption in the integrated operation of providing public transportation.”¹⁵⁶

consumes it in providing public transportation for persons or property.” IND. CODE § 6-2.5-5-27 (1982).

¹⁴⁶460 N.E.2d at 176.

¹⁴⁷457 N.E.2d 520 (Ind. 1983).

¹⁴⁸460 N.E.2d at 174 (quoting *Department of Revenue v. United States Steel Corp.*, 425 N.E.2d 659, 662 (Ind. Ct. App. 1981)).

¹⁴⁹460 N.E.2d at 175.

¹⁵⁰*Id.* (citing *Cave Stone*, 457 N.E.2d at 524).

¹⁵¹171 Ind. App. 299, 356 N.E.2d 1204 (1976).

¹⁵²*Id.* at 306, 356 N.E.2d at 1209.

¹⁵³460 N.E.2d at 175.

¹⁵⁴*Id.*

¹⁵⁵*Id.* at 176-77.

¹⁵⁶*Id.*

The court in *Harbor Belt*, while reviewing the standard set forth in *Cave Stone*, did not apply the test to each of the specific items claimed to be exempt by the railroad. Although the court claimed that each of these items was within the holding of *Cave Stone*, it appears that the court relied on its "broader concept" in interpreting what was "directly used or consumed for the rendering of public transportation" in order to find that purchases such as "repair and maintenance of buildings and general administrative and managerial operations" were exempt. Otherwise, it is impossible to imagine that such items would be exempt under a *Cave Stone* analysis.

F. 1984 Statutory Developments in Indiana Tax Law

Several provisions of particular importance were adopted by the 1984 General Assembly. The four most significant statutory changes are included in this Article.

1. *Changes in Indiana Adjusted Gross Income Tax.*—Section 6-3-1-3.5 of the Indiana Code defines the term "adjusted gross income" to mean the adjusted gross income as defined in the Internal Revenue Code, as modified by other provisions in that section.¹⁵⁷ One effect of this is that changes made in the federal tax structure which affect an individual's federal adjusted gross income will cause a corresponding change in the individual's Indiana adjusted gross income.¹⁵⁸ Such a change was brought about in federal income tax law, and consequently in Indiana law, by the Social Security Amendments of 1983.¹⁵⁹

This change is contained in the Internal Revenue Code at section 86, which generally provides that beginning in 1984, individuals receiving social security benefits and certain railroad retirement benefits may be taxed for federal income tax purposes on a portion of those benefits, depending upon their other income and tax return filing status.¹⁶⁰ As indicated, since the Indiana adjusted gross income follows the federal

¹⁵⁷IND. CODE § 6-3-1-3.5 (Supp. 1984). This code section provides that "the term 'adjusted gross income' shall mean: (a) In the case of all individuals, 'adjusted gross income' as defined in Section 62 of the Internal Revenue Code" *Id.*

¹⁵⁸Act of Feb. 24, 1984, Pub. L. No. 49-1984, Sec. 2, 1984 Ind. Acts 621, 623 (codified at IND. CODE § 6-3-1-11 (Supp. 1984)) defined the term "Internal Revenue Code" to mean the United States Internal Revenue Code of 1954 as amended and in effect on January 1, 1984.

¹⁵⁹Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65. (1983).

¹⁶⁰I.R.C. § 86(b) (West Supp. 1984). This section causes an inclusion of a portion of the social security benefits based upon the taxpayer's federal adjusted gross income, with certain modifications, but only to the extent these benefits exceed a "base amount." Lower income taxpayers should not be affected by this provision because the "base amount" provided in I.R.C. § 86(c) is \$25,000, except in the case of taxpayers filing a joint return, in which case the "base amount" is \$32,000, and \$-0- for taxpayers married at the close of a taxable year not filing a joint return and not living apart from their spouse at all times during the taxable year. *Id.*

adjusted gross income, those taxpayers subjected to federal income tax on social security benefits would also include this amount in their Indiana adjusted gross income if it were not for Public Law 49.¹⁶¹ This provision adds Indiana Code section 6-3-1-3.5(a)(12), a reduction of Indiana adjusted gross income for that amount equal to the social security and railroad retirement benefits included in the taxpayer's federal gross income by reason of section 86 of the Internal Revenue Code. Thus, even those selected taxpayers who will be subject to federal income tax due to social security and railroad retirement benefits will not be subjected to Indiana adjusted gross income tax on those amounts.

2. *Exemption from the Indiana Gross Income Tax and Filing Requirements for Certain Corporations.*—With Public Law 78,¹⁶² the 1983 Indiana General Assembly made a major change by exempting certain corporations from the Indiana gross income tax. This law is a significant departure from the longstanding Indiana rule that all corporations, except those qualifying as a federal S corporation,¹⁶³ were subject to tax on their gross income. For those qualifying corporations that are not federal S corporations, this exemption only applies to gross income tax and does not affect the corporation's requirement to pay Indiana adjusted gross income and Indiana supplemental net income taxes.

The significance of this provision is that it will no longer be desirable or necessary for corporations doing business in Indiana to elect to be treated as federal S corporations solely in order to avoid paying the gross income tax. Qualifying corporations may choose to revoke their election to be treated as S corporations in order to gain the benefits of income tax splitting between the corporate entity and the shareholders, who would otherwise be taxed on the corporation's income if the S corporation election were to be continued. In certain cases, the current federal income tax savings of such income splitting may more than offset the additional Indiana adjusted gross and supplemental net income taxes imposed on the corporation. Furthermore, this gross income tax exemption will remove one major tax disincentive for the incorporation of partnerships and sole proprietorships, thereby subjecting the resulting corporation to Indiana tax on its gross income.¹⁶⁴

The requirements to qualify under this exemption are nearly identical

¹⁶¹Act of Feb. 24, 1984, Pub. L. No. 49-1984, Sec. 1, 1984 Ind. Acts 621, 622 (codified at IND. CODE § 6-3-1-3.5 (Supp. 1984)).

¹⁶²Act of Mar. 23, 1983, Pub. L. No. 78-1983, 1983 Ind. Acts 662 (codified at IND. CODE § 6-2.1-3-24.5 (Supp. 1984)).

¹⁶³See IND. CODE § 6-2.1-3-24 (1982); IND. CODE § 6-3-2-3 (1982) (exempting corporations qualifying as federal S corporations from tax under the Indiana gross income tax and Indiana adjusted gross income tax, respectively).

¹⁶⁴A more complete discussion of the effects of this Act is contained at Smith & Hetzner, *To incorporate or not to incorporate—after 'Indiana SBC Act'*—, 27 RES GESTAE 270 (1983).

to the requirements for a corporation eligible to elect federal S corporation treatment. In fact, the statute incorporates the term "small business corporation" as having the same definition as that contained in the Internal Revenue Code at section 1361. Generally, section 1361(b) requires that, to be eligible as a "small business corporation," a corporation must: (1) be a domestic corporation; (2) not be a member of an affiliated group as defined therein, with one exception for inactive subsidiaries; (3) have only one class of stock, with certain exceptions; (4) have not more than thirty-five shareholders with husband and wife being treated as one shareholder; and (5) have only shareholders that are United States citizens or certain estates or trusts.¹⁶⁵

An additional requirement to be eligible to qualify as an Indiana small business corporation is included in section 6-2.1-3-24.5(c) of the Indiana Code. This section requires a small business corporation to have less than 25% of the corporation's gross income consist of passive investment income in a taxable year.¹⁶⁶ Generally, passive investment income is defined to include royalties, rents, dividends, interest, annuities, and gains from sales or exchanges of stocks and securities.¹⁶⁷

Public Law 47¹⁶⁸ amended section 6-2.1-3-24.5(d) of the Indiana Code to specify when a corporation desiring to be exempt from Indiana gross income tax must file proof with the Department of Revenue. The statute now clearly provides that the corporation claiming the exemption must annually provide proof to the Department of its eligibility for the exemption. This proof must be filed on or before the due date of the corporation's gross income tax return, including any extensions granted by the Department of Revenue therefor. Both the exemption and the proof requirement are effective for taxable years that begin after December 31, 1983.¹⁶⁹

3. Exclusion of Corporate Partnerships from Liability for the Indiana Gross Income Tax.—Public Law 47¹⁷⁰ also contains provisions which eliminate corporate partnerships from liability for Indiana gross income tax. Prior to amendment, the exemption for partnerships from gross income tax specifically excluded a partnership which had one or more partners that were corporations.¹⁷¹ Under the previous provisions of the law, several questions had arisen and were litigated concerning the exact

¹⁶⁵I.R.C. § 1361(b) (West Supp. 1984).

¹⁶⁶The term "passive investment income" is, by incorporation, defined to have the same meaning as contained at I.R.C. § 1362(d)(3)(D) (West Supp. 1984).

¹⁶⁷*See id.*

¹⁶⁸Acts of Mar. 5, 1984, Pub. L. No. 47-1984, 1984 Ind. Acts 617 (codified at IND. CODE § 6-2.1-3-24.5(d) (Supp. 1984)).

¹⁶⁹*See id.*, Sec. 8, at 619.

¹⁷⁰IND. CODE §§ 6-2.1-3-25, 6-3.1-3-1 (Supp. 1984).

¹⁷¹Repealed were portions of Indiana Code section 6-2.1-3-25 (1982).

application of the term “corporate partnership” and its result when an otherwise exempt corporation was the corporate partner, and when multitiered partnerships existed.¹⁷²

The effect of this new law is particularly dramatic to limited partnerships formed and sold to the public as tax shelter investments. Almost always, it is desirable for the general partner of the limited partnership to be a corporation for two reasons: (1) to limit the liability of the general partner to the corporate assets; and (2) to provide continuity to the partnership since it would be dissolved under state law in the event of the death, insanity, or bankruptcy of an individual general partner. Indiana law prior to the decisions of *Indiana Department of State Revenue v. Glendale-Glenbrook Associates*¹⁷³ and *Park 100 Development Co. v. Indiana Department of State Revenue*,¹⁷⁴ which imposed the gross income tax on *each* partner of a “corporate partnership,” made it generally unacceptable to have a corporate general partner, thus forcing an individual to be the general partner and accept the associated liabilities. After the *Glendale* and *Park 100* decisions, it was possible to have an S corporation be the general partner without the imposition of gross income tax on the partnership’s income. The change in the law likely will result in more general partners in limited partnerships being regular corporations.¹⁷⁵ All practitioners will still need to be careful in forming these limited partnerships to respect the possibility of the Internal Revenue

¹⁷²See *Indiana Dep’t of Revenue v. Glendale-Glenbrook Assocs.*, 429 N.E.2d 217 (Ind. 1981); *Park 100 Dev. Co. v. Indiana Dep’t of State Revenue*, 429 N.E.2d 220 (Ind. 1981). A discussion of these cases is contained at Boyd, *Taxation, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 355, 364-66 (1983).

¹⁷³429 N.E.2d 217 (Ind. 1981).

¹⁷⁴429 N.E.2d 220 (Ind. 1981).

¹⁷⁵The new law establishes that a corporate partnership will not be subject to gross income tax; however, it does not explain how the gross income tax will be applied to corporations which are partners of a corporate partnership. Under the “aggregate” theory of partnerships where the partnership is not considered a separate entity, but merely an aggregation of separate individuals or entities, the corporate partner would be treated as receiving its proportionate amount of the gross receipts of the partnership. This would impose a substantial accounting and reporting requirement upon corporate partnerships and may lead to avoidance of corporate partnership structures similar to that experienced under the repealed law. In many partnerships, it may be impossible to determine the proportionate share of gross income of any partner, particularly partnership agreements with special allocation provisions.

Alternatively, under the “entity” theory of partnerships where the partnership is considered a separate entity, only actual distributions by the partnership to the corporate partner would result in gross income tax liability. This would seem to reach a conclusion which is appropriate given the concept of “gross income” contained in Indiana Code section 6-2.1-1-2(a) which imposes gross income tax on the “gross receipts of a taxpayer.” IND. CODE § 6-2.1-1-2(a) (Supp. 1984). The largest and most obvious advantage to this interpretation is that the corporate partner would be taxed on the “net” proceeds of the partnership after tax deductions, a result which would not be permitted if the corporate partner had directly received its share of the “gross receipts” of the business carried on

Service reclassifying these partnerships as "associations" taxable as corporations not as partnerships.¹⁷⁶

4. *Enactment of a County Option Income Tax.*—As of July 1, 1984, Public Law 44¹⁷⁷ permits Indiana counties to have the option of adopting either the County Adjusted Gross Income Tax ("CAGIT") or the County Option Income Tax ("COIT"), but not both. COIT was introduced by

by the partnership. This is precisely the type of avoidance of the gross income tax that the repealed provision relating to corporate partnerships was designed to avert.

If actual distributions to the corporate partner are determinative as its gross receipts subject to the gross income tax, this will provide a substantial opportunity for tax planning. Arranging partnership distributions to fall in particular years would enable corporations to delay gross income tax payments and diminish them to the extent distributions are switched away from years where the gross income tax liability exceeds the adjusted gross income tax liability. Further, the actual distributions may have no relationship to the income of the partnership for the same taxable year. Finally, the partnership may choose not to make any distributions at all, even though it is generating large amounts of income. The most flagrant abuses of any of these advantages may lead to attacks by the Indiana Department of Revenue based on the "substance over form" argument.

Another approach to this problem is to have the corporation report as gross income its portion of the partnership net income just as it is reported for adjusted gross income tax purposes. This would be the simplest answer to the aforementioned accounting and timing difficulties because the same information is already required for reporting to the corporate partner. This approach would also minimize the opportunity for tax avoidance since the income would be taxed in the same year that it was generated. Unfortunately, this approach completely ignores the wording and intent of the Gross Income Tax Act unless a strained interpretation of the term "gross receipts" is accepted.

Further complicating this matter, and of no less importance, is the fact that the receipt of gross income by a corporation is taxed at two substantially different rates for the purpose of the gross income tax. The initial question which arises is whether the nature of the activity for purposes of the applicable tax rate will be set at the partnership or corporate level, which may again involve the application of the "aggregate" or "entity" theory of partnerships. Presumably, whichever theory is followed will be the same theory that is followed for purposes of determining at what level the gross receipts will be treated as received by the corporation. An application of the statute would again seem to require that actual receipt of distributions will control, which will make it nearly impossible to define whether a distribution to a partner should be taxed at the higher or lower rate of gross income tax. See IND. CODE §§ 6-2.1-2-4, -5 (1982). Since partnership gross receipts will likely not be in the same amount and the same year as any actual distributions to the corporate partner, there may be a requirement to establish a "tracing" of the nature of any distributions. In most cases, this would be an accounting nightmare.

The lack of segregation of gross income between the separate rates may subject the taxpayer to the provisions of Indiana Code section 6-2.1-2-7(c) which provides that a taxpayer who fails to separate his gross income as required will have his "entire gross income" subject to the higher rates. IND. CODE § 6-2.1-1-7(c) (1982).

The Indiana Department of Revenue, in Information Bulletin Number 31, dated March, 1984, has acknowledged the elimination of the gross income tax on corporate partnerships. It does not undertake to establish its interpretation of the proper application of gross income tax to corporate partners. Hopefully, additional guidance will be forthcoming on this question.

¹⁷⁶See Treas. Reg. § 301.7701-2 (1983); see also Rev. Proc. 74-17, 1974-1 C.B. 438, as modified for the requirements for obtaining an advance Private Letter Ruling.

¹⁷⁷Act of Mar. 7, 1984, Pub. L. No. 44-1984, 1984 Ind. Acts 563.

this new law and permits adopting counties to initially tax county taxpayers at a rate of .2% on their Indiana adjusted gross income. A "county taxpayer" includes a resident of that county on January 1 of the applicable calendar year or a person maintaining his principal place of business or employment in that county on January 1 of the applicable year and not residing on that same date in a county in which COIT or CAGIT is in effect.¹⁷⁸

COIT may be initially adopted at a rate of .2% on resident county taxpayers, automatically rising .1% each year until it reaches a maximum of .6%.¹⁷⁹ After the rate has reached the .6% level, the county may act to increase COIT by no more than .1% each year until it reaches a maximum of 1%.¹⁸⁰ When COIT applies to nonresident taxpayers of a county, the rate will at all times be one-fourth of the tax rate imposed upon the resident county taxpayers.¹⁸¹

G. Unitary Taxation

Last year's Survey Article on Taxation¹⁸² reported the United States Supreme Court decision in *Container Corp. of America v. Franchise Tax Board*.¹⁸³ In *Container*, the Supreme Court gave state courts broad authority to determine whether or not the income of corporations related to a corporation doing business in their state was part of a "unitary business" and thus subject to taxation in their state based on the state's apportionment laws. The State of Indiana's application of *Container* was set forth in Commissioner's Directive #10.¹⁸⁴ Directive Number 10 indicates that the Department of Revenue will not use combined income tax reporting under the "unitary business" concept as a means to assess additional tax, but will only use this for the fair reporting and reflection of income attributable to Indiana when the standard three factor formula clearly does not fairly reflect income. A special point is made that Indiana should not be characterized as a "unitary state." In support of this contention, the Department of Revenue indicates that approximately eighty taxpayers are filing combined Indiana adjusted gross income tax and supplemental net income tax returns as unitary business entities. It is indicated that many of these are filing as unitary businesses due

¹⁷⁸IND. CODE § 6-3.5-6-1 (Supp. 1984).

¹⁷⁹*Id.* § 6-3.5-6-8(b), (d).

¹⁸⁰*Id.* § 6-3.5-6-9(a).

¹⁸¹*Id.* § 6-3.5-6-8(e).

¹⁸²King & Bennett, *Taxation, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 319, 319 (1984).

¹⁸³103 S. Ct. 2933 (1983). For an extensive discussion of this case, see Stuart & Williams, *Constitutional Considerations of State Taxation of Multinational Corporate Income: Before and After Container Corporation of America v. Franchise Tax Board*, 16 IND. L. REV. 783 (1983).

¹⁸⁴Commissioner's Directive Number 10, February, 1984 (Indiana's position on the United States Supreme Court decision in *Container Corp. of America v. Franchise Tax Board*).

to the request of the corporations and not due to Department requirements.

In a related announcement,¹⁸⁵ Governor Orr stated that the only time combined reporting will be required for taxpayers conducting unitary businesses will be when there is evidence of a blatant attempt to avoid Indiana taxes. He further stated that there were only about fifteen returns being required and that those were the result of the standard three factor formula not fairly reflecting income of the taxpayers. He also indicated that Indiana will not adopt unitary reporting as a general policy because of the potential adverse effect to Indiana's future economic growth.¹⁸⁶

Apparently, one inducement in the publication of the Commissioner's Directive and the Governor's letter was the hope that the Sony Corporation might locate a new plant in Terre Haute, Indiana.¹⁸⁷ This report indicated that prior to Sony agreeing to place a large plant near Terre Haute, Sony officials obtained commitments from Governor Orr and bipartisan political support for an agreement to abolish the unitary tax.

If these reports are correct, it appears that legislation to abolish the unitary tax in Indiana will be a prime goal of the General Assembly in its next session. Lacking this, the Commissioner's Directive and the Governor's letter should reassure most taxpayers that they will not be required to file unitary reports in Indiana. Nevertheless, the right of Indiana to impose combined reporting when the three factor formula does not "fairly reflect income" is clearly reserved. What constitutes a fair reflection of income is something which could likely have a different meaning to the Department of Revenue and to taxpayers with potential liability under the unitary business concept.

¹⁸⁵Letter from Robert D. Orr, Governor of the State of Indiana (February 23, 1984).

¹⁸⁶*Id.*

¹⁸⁷INDIANAPOLIS BUSINESS JOURNAL, June 18-24, 1984, at 13.

XIV. Torts

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A. Introduction

While the survey period saw a relatively large number of appellate opinions in the tort area, a rather small proportion of these opinions was significant in enunciating new law. The most significant single development in the survey period was the passage of the Indiana Comparative Fault Act, effective January 1, 1985.¹ Inasmuch as the Act and its significance have been exhaustively discussed in a symposium in a recent issue of this publication,² the reader is referred to that issue for analysis of the Act.

B. Negligence

1. *Duty to Anticipate Negligence of Others.*—In *Pilkington v. Hendricks County Rural Electric Membership Corp.*,³ the Indiana Court of Appeals considered several instructional issues relating to the duty to anticipate the negligence of others. The case arose when a nine-year-old girl received electrical burns while watching races at the Indianapolis Raceway Park. The girl was seated on temporary metal bleachers, and another spectator at the top of the bleachers somehow contacted a 7200 volt uninsulated power line belonging to the defendant. The current passed through the spectator, the metal bleachers, and then the girl. The bleachers had been installed under the supervision of the Indianapolis Raceway Park. Although such bleachers had been erected in past years, at the time of the accident, additional taller bleachers had been installed to accommodate an expected larger crowd, and the additional bleachers brought the top of the stands within two feet of the uninsulated line. It was undisputed that the defendant utility company was not notified about the expansion of the bleachers.

In affirming a verdict for the defendant, the Indiana Court of Appeals concluded that the utility company was not under a duty to anticipate negligence on the part of the race track. The court held that in the absence of knowledge or notice to the contrary, a person has no duty to anticipate negligence on the part of others, and is entitled to assume that others will exercise ordinary care and to act on that assumption.⁴

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¹IND. CODE § 34-4-33-1 to -13 (Supp. 1984).

²See *Symposium on the Indiana Comparative Fault Act*, 17 IND. L. REV. 687 (1984).

³460 N.E.2d 1000 (Ind. Ct. App. 1984).

⁴*Id.* at 1004.

The standard of care applied to the utility was an objective one, based on whether the utility knew or should have known of the hazard and anticipated the danger. Absent knowledge or notice, there is no liability.

Consistent with this principle, the court held that the electric utility did not have to constantly monitor or police its power lines in order to make sure that nothing was in dangerous proximity to them.⁵ In this case, a representative of the utility had inspected the raceway premises only a few days before the accident. At that time, however, the temporary bleachers were not yet in place. Presumably, if a representative of the utility had visited the site once the temporary stands had been erected, knowledge or notice would be imputed, and it would have been possible to hold the utility liable. In the absence of such proof, however, no duty was found.

2. *Borrowing Standards of Care.*—In some areas, Indiana law extends liability at least as far as, or perhaps farther than, most other jurisdictions.⁶ This is particularly apparent in cases where courts employ borrowed standards of care. Two interesting instances of this borrowing occurred during the survey period.

In the first instance, *Elsperman v. Plump*,⁷ the Indiana Court of Appeals reaffirmed the developing line of authority that holds that a provider of alcoholic beverages may be liable for injuries inflicted by an intoxicated person as a result of the intoxication, where the result is reasonably foreseeable and the provision of the liquor is in violation of statute.⁸ In *Elsperman*, an infant's parents brought a wrongful death action against a bartender and his employer, a Moose Lodge, alleging that a patron was served liquor after he had become noticeably intoxicated. Refusing the offer of another patron to drive him home, the intoxicated individual drove away from the lodge and only seconds later was involved in a head-on collision with the car in which plaintiffs' decedent was a passenger. After the intoxicated driver had settled, the case against the bartender and the lodge went to a jury on the theory that the defendants had been negligent in serving alcoholic beverages to an individual who was to their knowledge intoxicated, in violation of an Indiana statute which makes it unlawful to sell, barter, deliver, or give away an alcoholic beverage to an intoxicated person if the provider knows that the person is intoxicated.⁹

The jury in *Elsperman* found the lodge and the bartender negligent

⁵*Id.* at 1006.

⁶See generally Vargo, *Torts, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 341 (1984).

⁷446 N.E.2d 1027 (Ind. Ct. App. 1983).

⁸See, e.g., *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Parrett v. Lebamoff*, 408 N.E.2d 1344 (Ind. Ct. App. 1980); *Brattain v. Herron*, 159 Ind. App. 663, 309 N.E.2d 150 (1974).

⁹IND. CODE § 7.1-5-10-15 (1982).

and rendered a verdict against them. The trial court granted a judgment notwithstanding the verdict, but the court of appeals, upon examination of the record, concluded that there was ample evidence to show a violation of the statute and reinstated the jury verdict.¹⁰

Thus, Indiana courts have employed a seemingly unimportant criminal statute to create a civil standard of negligence. Although the penalty imposed under the criminal statute is relatively inconsequential, the potential for large jury verdicts in civil actions exists. Moreover, the borrowed standard of care may be imposed upon categories of defendants previously thought to be immune from liability.

For example, a recent New Jersey case¹¹ attracted national attention when that state's supreme court held that a social host who provides intoxicating liquor to a guest knowing the guest to be intoxicated and knowing that the guest will soon drive is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the guest, if the negligence is caused by the intoxication. Nothing in Indiana law, other than the strong policy considerations set forth in the dissent in the New Jersey case,¹² prevents Indiana from reaching the same result, since under *Brattain v. Herron*¹³ there is no legal distinction between an ordinary social provider of liquor and a tavern keeper.¹⁴

Indiana, like many other states, once had a Dram Shop Act which directly imposed civil liability upon tavern keepers for damage caused by intoxicated patrons. Although that statute has long since been repealed by the legislature, it has effectively been reenacted, perhaps upon a broader scale, by the judiciary.

Another interesting use of a borrowed standard of care is illustrated in *Duke's GMC, Inc. v. Erskine*.¹⁵ The plaintiff, Erskine, lost sight in one eye while playing golf when he was struck by a golf ball hit by a player in the foursome behind him. The plaintiff requested, and the court gave, an instruction which stated, in effect, that all people playing golf are entitled to assume that their fellow players will observe the rules and regulations of the game. Duke's GMC, appealing a jury verdict in favor of the injured golfer, argued that this instruction effectively elevated the rules of golf to the same level as law.

While denying that the instruction had this effect, the court of appeals effectively indicated that even the rules of a sport may serve as the source of an implied standard of care. As the court put it:

The recognized rules of a sport are at least an indicia of the standard of care which the players owe each other. While

¹⁰446 N.E.2d at 1032.

¹¹Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

¹²*Id.* at 560-70, 476 A.2d at 1230-36 (Garibaldi, J., dissenting).

¹³159 Ind. App. 663, 309 N.E.2d 150 (1974).

¹⁴*Id.* at 674, 309 N.E.2d at 156.

¹⁵447 N.E.2d 1118 (Ind. Ct. App. 1983).

a violation of those rules may not be negligence per se, it may well be evidence of negligence. Neither player in this instance was a novice golfer and both parties were aware of the rules and etiquette of the game. Yet there was evidence presented that [the defendant] violated one or more of those rules; the result of which was [the plaintiff's] injury. Therefore, [the plaintiff] was entitled to such an instruction.¹⁶

3. *Contributory Negligence as a Matter of Law*.—The Indiana Court of Appeals considered several cases in which defendants argued that plaintiffs were contributorily negligent as a matter of law. While contributory negligence will soon be relegated to very limited factual situations by the new Comparative Fault Act, an examination of these decisions is, nonetheless, instructive because they serve to emphasize the great difficulty of proving contributory negligence as a matter of law. Of the four cases where the argument was made in the court of appeals, only in one case did it succeed. That case was *Gasich v. Chesapeake & Ohio Railroad*.¹⁷

Gasich was a wrongful death action against the railroad, its engineer, and its conductor which arose out of a fatal auto-train collision. After the plaintiff's case had been presented, the defendants moved for judgment on the evidence, and the trial court granted the motion on the ground that the plaintiff's decedent had been contributorily negligent as a matter of law. The court of appeals affirmed the trial court after an exhaustive review of the facts.¹⁸

The evidence at trial indicated that Gasich drove his vehicle past two witnesses sitting in a station wagon. He did not look to either side, but approached the railroad crossing in ignorance of the oncoming train. The crossing was marked with a standard crossbuck warning sign, and there were neither visual obstructions nor inclement weather to impair visibility. The train, with its headlight on as it approached the crossing, sounded its horn at a distance of approximately 1300 feet from the crossing, and its bell tolled continuously as it approached the intersection. The plaintiff's argument that her husband did not hear the train was effectively vitiated by the fact that the train had been clearly audible and visible to the witnesses in the station wagon. Gasich proceeded into the crossing and died as a result of the collision. The court of appeals found that Gasich's failure to pay attention to the oncoming train, when by looking he could have seen it and by listening he could have heard it in time to avoid the collision, rendered him contributorily negligent as a matter of law.¹⁹

¹⁶*Id.* at 1124.

¹⁷453 N.E.2d 371 (Ind. Ct. App. 1983).

¹⁸*Id.* at 379.

¹⁹*Id.* at 376.

An interesting contrast with this point of view is found in *Jones v. Gleim*,²⁰ which originated in the same district of the court of appeals as the *Gasich* opinion. In *Jones*, the plaintiff crossed a street in the middle of a block after looking both ways and seeing no cars approaching. Because it was dusk at the time and raining very hard, visibility was poor. As she ran across the street, Jones was hit by the defendant's car. As in *Gasich*, the trial court granted the defendant's motion for judgment on the evidence at the close of the plaintiff's case.

On appeal, the defendant argued that Jones was guilty of contributory negligence as a matter of law because she did not yield the right of way to the defendant's car as required by statute and she failed to keep a lookout as she was running across the street. The court of appeals majority conceded that Jones had violated a statute but held that this merely shifted the burden to the violating party to come forward with evidence that compliance was "impossible or excusable."²¹ The court reversed and remanded the issue of contributory negligence as one for the jury. The majority emphasized that Jones' violation of the traffic statute would be excused and, therefore, would not constitute negligence if the jury disbelieved the defendant's testimony that his headlights were on and instead inferred that Jones did not see the approaching car because its lights were off.²²

Judge Hoffman, in a persuasive dissent, argued that the majority had engaged in a weighing of the facts and credibility of the trial testimony. While Judge Hoffman agreed that the jury might well have chosen to disbelieve the defendant's testimony that his lights were on, there was no evidence in the record to contradict that testimony, and it therefore had to be considered as a fact that the defendant's lights were on. Marshalling the other evidence in the record, Judge Hoffman concluded:

As stated by the majority Jones' conduct, crossing the street at the center of the block, violated a traffic statute and constituted prima facie evidence of Jones' negligence. This coupled with the uncontroverted evidence . . . clearly establishes that no question exists as to Jones' contributory negligence. An individual whose vision is impaired by the weather and is deaf in one ear does not act reasonably in crossing a street at the center of a block on a dark, rainy and foggy night. This is especially so when the relative safety of a crosswalk is near at hand and known to the party.²³

²⁰460 N.E.2d 1017 (Ind. Ct. App. 1984), *vacated*, 468 N.E.2d 205 (Ind. 1984).

²¹460 N.E.2d at 1018.

²²*Id.* at 1019.

²³*Id.* at 1020-21 (Hoffman, J., dissenting). Since this survey Article was written, the Indiana Supreme Court granted transfer and vacated the decision of the court of appeals for the reasons stated by Judge Hoffman. *Jones v. Gliem*, 468 N.E.2d 205 (Ind. 1984).

Gasich and *Jones* illustrate the difficulties of the contributory negligence doctrine. The *Jones* case in particular reveals that courts may go to considerable lengths in order to avert the harsh results that must ensue if a plaintiff is found contributorily negligent.

In the same vein as *Jones* is the result in *Brock v. Walton*.²⁴ The plaintiff, Brock, was traveling south on a highway when a car traveling in the other direction swerved across the center line, briefly returned to its own lane, and then swerved again directly toward Brock. Brock's vehicle left over sixty feet of skid marks leading toward the right-hand berm, but a head-on collision nonetheless resulted in which Brock was injured. The case went to a jury, which found Brock guilty of contributory negligence. Brock challenged the verdict on the theory that it was not supported by the evidence. The court of appeals, in a two-to-one decision, reversed and remanded for a new trial on the theory that the skid marks demonstrated that Brock was at least aware of a threatening emergency and attempted some sort of evasive action, despite his testimony that he never saw the other car coming across the center line.²⁵

Once again, the dissent, this time by Chief Judge Buchanan, seems more persuasive. The dissenting opinion emphasized that under the rules of appellate review, where the claim is a lack of sufficiency of the evidence, the court "must affirm unless there is a *total* lack of evidence supporting the jury verdict."²⁶ In Chief Judge Buchanan's reasoning, there were many possible factors that may have informed the jury's verdict in *Brock v. Walton*. For one, Brock's admission that he never saw the oncoming car before the impact constituted "devastating" evidence of failure to keep a lookout, and consequently provided adequate support for the jury's finding of contributory negligence.

A more typical holding in the area of contributory negligence as a matter of law was enunciated in *Public Service Co. of Indiana v. Gibbs*.²⁷ In *Gibbs*, the court affirmed a judgment for the plaintiff who had suffered electrical injuries when a fertilizer hopper truck he was operating came into contact with an uninsulated power line. The defendant argued that the plaintiff had been contributorily negligent as a matter of law because of his testimony that he had observed the power lines for approximately nine years and knew of their general location. The court found that the plaintiff's testimony that he had looked up and did not see the wires created a conflict in the evidence. Thus, as the court reasonably concluded, any reversal based on contributory negligence as a matter of law could only result from a reweighing of the conflicting evidence and could not be reached under the applicable standard of review relating to negative judgments.²⁸

²⁴456 N.E.2d 1087 (Ind. Ct. App. 1983).

²⁵*Id.* at 1092.

²⁶*Id.* at 1094 (Buchanan, C.J., dissenting) (citation omitted).

²⁷460 N.E.2d 992 (Ind. Ct. App. 1984).

²⁸*Id.* at 995.

4. *Open and Obvious Danger Rule Expanded to Negligence.*—The so-called “open and obvious” doctrine was first clearly announced in Indiana jurisprudence in the 1980 case, *Bemis Co. v. Rubush*.²⁹ The doctrine, applicable in products liability cases, operates to preclude liability where the defect in a product was apparent or should have been apparent to the ordinary user or consumer of the product.³⁰ From a defendant’s standpoint, the “open and obvious” doctrine has proved invaluable in the products liability context, because the rule creates an objective standard rather than a subjective standard.³¹ Moreover, the focus of the “open and obvious” doctrine is attractive to defendants. Analysis under this doctrine focuses upon the nature of the danger and whether it should be obvious to the ordinary user. In a contributory negligence analysis, on the other hand, the focus is on the behavior of the plaintiff and whether he exercised due care for his own safety.³² Because of this difference in focus, it is inherently easier for a court to decide, as a matter of law, that the nature of a danger was such that it should have been apparent to the person who encountered it than it is for a court to conclude that a plaintiff did not exercise reasonable care for his own safety. Typically, it is not difficult for a plaintiff to create an issue of fact, and therefore get to the jury against a contributory negligence defense, by stating facts which would support the hypothesis that he exercised due care for his own safety. However, it is another matter for a plaintiff to create a genuine issue of fact with respect to whether a particular danger is or should have been open and obvious.

During this survey period, the Indiana Court of Appeals made the benefits of the “open and obvious” doctrine accessible to defendants in cases involving negligence outside the products liability context. In *Law v. Yukon Delta, Inc.*,³³ the court concluded that it is logical to apply the “open and obvious” rule in *all* negligence actions, not merely those involving products.³⁴

Law arose when the plaintiff, a business invitee on a service call, slipped and fell on Yukon’s business premises. The trial court granted

²⁹401 N.E.2d 48 (Ind. Ct. App. 1980), *vacated on other grounds*, 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

³⁰401 N.E.2d at 56. *See also* Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977); Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108 (7th Cir. 1976); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969); Cates v. Jolley, 268 Ind. 74, 373 N.E.2d 877 (1978).

³¹To illustrate, a defendant attempting to prove the ordinary incurred risk defense to products liability must show that the plaintiff had actual subjective knowledge of the risk, yet nonetheless proceeded unreasonably to use the product. Such actual knowledge need not be proven under the open and obvious rule; if the danger presented by the product merely “should have been” apparent to the user, recovery is precluded.

³²*See supra* notes 17-28 and accompanying text.

³³458 N.E.2d 677 (Ind. Ct. App. 1984).

³⁴*Id.* at 679.

the defendant's motion for summary judgment, and the appellate court affirmed. The court of appeals noted that Justice Pivarnik's enunciation of the "open and obvious" rule in *Bemis* included products liability actions based upon *negligence* as well as those based upon strict liability. The court determined that an expansion of the "open and obvious" doctrine to the facts of the case before it was appropriate:

First, all negligence actions involve the same closed set of prima facie elements as a basis of recovery whether they sound in products liability or otherwise. Further, the "open and obvious danger" rule is a consistent and logical factor to consider when determining whether a person has acted in an ordinary and reasonable fashion. A person that engages in activity with the knowledge that he is exposing himself to an open and obvious danger can hardly be regarded reasonable or prudent.³⁵

The court then reviewed the evidence, noting that the plaintiff had proceeded through an area of the defendant's plant containing numerous obstacles. As the plaintiff continued, he became aware that the floor was wet and slippery. He asked no one for help, but proceeded until the fall occurred.

Arguably, *Law* does not represent a true extension of the "open and obvious" doctrine. The court depended very heavily upon the fact that the plaintiff was actually aware of the wet and slippery condition of the floor. Thus, the analysis in the majority opinion in *Law* did not focus upon the nature of the danger and whether it *should have been* apparent to the plaintiff; instead, it focused upon the plaintiff's subjective state of awareness as evidenced in his deposition, and the reasonableness of his course of action subsequent to becoming aware of the danger. There is nothing in *Law* that would preclude sustaining a motion for summary judgment on either contributory negligence or incurred risk grounds. Therefore, because the analysis did not transcend traditional contributory negligence or incurred risk analyses, it remains to be seen whether or not *Law* actually portends an expansion of the "open and obvious" doctrine.

C. Premises Liability

1. *Trap Theory*.—In *Gaboury v. Ireland Road Grace Brethren, Inc.*,³⁶ the Supreme Court of Indiana, in a divided opinion, provided a thoughtful analysis of the duty of a landowner in respect to a possible trap or pitfall on his land. The plaintiff in *Gaboury* was riding his motorcycle at approximately one o'clock in the morning. When he drove past the

³⁵*Id.*

³⁶446 N.E.2d 1310 (Ind. 1983).

intersection where he had intended to turn, the plaintiff decided to turn around in a church parking lot at the end of the road. The plaintiff headed for the driveway to the church parking lot. This progress was abruptly halted, however, with resulting physical injuries, by a steel cable which had been stretched across the driveway by the church in order to prevent public use when church was not in session. The state of the plaintiff's knowledge was somewhat unclear, because the plaintiff made significantly different statements in an affidavit and in a deposition.³⁷ In the deposition, the plaintiff claimed awareness of the area and everything about it except for the fact that the cable was present across the church driveway. In the affidavit, however, the plaintiff stated that he could not be sure where the end of the road was located, and was not aware that he had entered church property.

The plaintiff also sued the City of South Bend. The plaintiff's case against the city was premised on the theory that the city had a duty to light its streets in order to illuminate the church property, including the cable in question. All justices, except Justice Hunter,³⁸ agreed that the city had absolutely no duty to light its streets in such a way as to illuminate adjacent private property and disclose traps or pitfalls on such property.³⁹

In addition to sustaining the city's motion for summary judgment, the supreme court also sustained a summary judgment in favor of the landowner, Ireland Road Grace Brethren. Implicitly concluding that the plaintiff in this case was a licensee, the court rejected the argument that the cable was a trap or hidden danger, constituting an exception to the rule that a licensee takes the land as he finds it.⁴⁰ The court adopted the following definition of a trap: "a danger which a person who does not know the premises could not avoid by reasonable care and skill; or . . . a hidden danger lurking on the premises which may be avoided if [known]."⁴¹ Measured against these standards, the court found that

³⁷The *Gaboury* case is significant from a procedural standpoint alone, in that it holds that an affidavit which contradicts prior sworn statements in a deposition, without further explanation, does not suffice to create issues of fact that will defeat a summary judgment motion. *Id.* at 1314.

³⁸Justice Hunter maintained that evidence before the trial court disclosed an alternative theory of negligent design or construction of the city street, and he appears to say that the complaint was sufficient to withstand a summary judgment for that reason. Justice Hunter did not comment directly on the majority's holding that there is no duty on the part of a municipality to illuminate adjacent private property. *Id.* at 1316-17 (Hunter, J., dissenting).

³⁹*Id.* at 1314.

⁴⁰*Swanson v. Shroat*, 169 Ind. App. 80, 345 N.E.2d 872 (1976).

⁴¹446 N.E.2d at 1315 (citing *Bischel v. Blumhost*, 429 S.W.2d 301, 304 (Mo. Ct. App. 1968)). The alteration in this quote reflects the correct form, used by the *Bischel*

the closing of a driveway by stretching a cable across it is not "so unusual a situation" that it may be considered dangerous or hazardous. The court concluded the plaintiff could have avoided injury through the use of ordinary and reasonable care.⁴² The court was not specific about precisely what steps could be taken by a licensee, in the exercise of ordinary and reasonable care, to discover such a cable stretched across a driveway in time to stop.

In dissent, Justice DeBruler followed the reasoning of the court of appeals⁴³ and concluded that the church had, at least at some point, invited the public onto the property. The cable was stretched across the driveway in order to withdraw the invitation. Despite the conflicting versions given by the plaintiff, he was consistent about one thing, and that was that he did not know that the cable was there. Justice DeBruler, joined by Justice Hunter, would have imposed a limited duty on landowners who wish to take steps to temporarily close their properties to the public to use "such means and measures under the circumstances as are perceivable and understandable by one actually about to enter, so that the mind can come to an appreciation that the owner does not want him to do so, and thus command the body to turn about and go another way."⁴⁴ While this dissent raises significant questions about the opinion on its facts, the case is important, nonetheless, because of its effort to define what constitutes a "trap" or "pitfall."

2. *Landowner's Duty to Protect Invitee from Acts of Third Parties.*— In *Bearman v. University of Notre Dame*,⁴⁵ the court of appeals liberally interpreted the duty of the operator of a place of public entertainment to keep the premises safe for invitees. The case arose when the Bearmans, husband and wife, attended a football game at Notre Dame. As they were walking through the parking lot toward their car, the couple observed two men who were apparently drunk. In the process of passing Mrs. Bearman, one of the men fell into her from behind, knocking her to the ground and causing her to sustain a broken leg. Mrs. Bearman argued that as she was a business invitee of Notre Dame, the university had a duty to protect her from injury caused by the acts of others on the premises. Notre Dame's position was that it did not have notice of the particular danger posed to the plaintiff; and in the absence of such notice, it had no duty to protect Mrs. Bearman.

The trial court granted summary judgment to the university on the

court. 429 S.W.2d at 304 (quoting 65 C.J.S. *Negligence* § 63 (1966)). The *Gabourg* court's opinion used "unknown" where the term "known" should have been used. See 446 N.E.2d at 1315 (citing *Bischel*, 429 S.W.2d at 304).

⁴²*Id.*

⁴³*Gaboury v. Ireland Road Grace Brethren, Inc.*, 441 N.E.2d 227 (Ind. Ct. App. 1982), *vacated*, 446 N.E.2d 1310 (Ind. 1983).

⁴⁴446 N.E.2d at 1316 (DeBruler, J., dissenting).

⁴⁵453 N.E.2d 1196 (Ind. Ct. App. 1983).

theory that it did not have actual or constructive knowledge of the danger. The appellate court agreed that although a landowner has a duty to exercise ordinary and reasonable care to protect a patron at a place of public entertainment from injury caused by third persons, the landowner must first have actual or constructive knowledge of the danger.⁴⁶ However, the court of appeals reversed and remanded on the theory that Notre Dame had reason to know, from past experience, that there was a likelihood that alcoholic beverages would be consumed on the premises before and during the football games and that tailgate parties would be held in the parking areas around the stadium. The court quoted the following passage from section 344 of the Restatement (Second) of Torts:

“If the place or character of [the landowner’s] business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.”⁴⁷

Based on this duty, the court found that it was a jury question whether or not Notre Dame had employed adequate protective measures, given its knowledge of the presence of tailgate parties and intoxicated fans in the parking areas around the stadium.⁴⁸

3. *Statutory Protection for Landowners Allowing Free Use of Land.*—In *Schwartz v. Zent*,⁴⁹ the court of appeals considered a plaintiff’s action against landowners for damages resulting from a hunting accident. The accident occurred when Zent, who had permission to hunt on the landowner’s property, fired a shot which escaped the boundaries of that property and injured Schwartz, who was trapping on the land of a neighbor. The trial court directed a verdict in favor of the landowners, relying upon Indiana Code section 14-2-6-3, which exempts a landowner from liability for “any injury to person or property” caused by an act or omission of other persons using his premises.⁵⁰ Schwartz argued that since he himself was not within the landowners’ property when the injury occurred, the statute did not apply to him. The court, however, held that the phrase “any injury to person or property” employed in the statute rendered Schwartz’ location when injured of no relevance.⁵¹

⁴⁶*Id.* at 1198.

⁴⁷*Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965)).

⁴⁸453 N.E.2d at 1198.

⁴⁹448 N.E.2d 38 (Ind. Ct. App. 1983).

⁵⁰IND. CODE § 14-2-6-3 (Supp. 1984).

⁵¹448 N.E.2d at 40.

D. Miscellaneous Torts and Defenses

1. *False Imprisonment*.—In a case of first impression, the Indiana Court of Appeals established a “good faith” test as a defense to an action for false imprisonment. In *Barnes v. Wilson*,⁵² police officers arrested Tony Barnes, Jr. when the warrant should have been issued for a Tony Barnes, Sr. The warrant in question simply read “Tony R. Barnes.” According to the plaintiff, he repeatedly told the arresting officers that he was the wrong man, and asked them to “check it out.” However, the police took him to jail and kept him there over the weekend. The plaintiff was released when the court discovered the mistake on the following Monday morning.

Judge Ratliff reviewed the law concerning the civil liability of police officers for false imprisonment arising from the mistaken service of a warrant on a person with a similar name. While some jurisdictions hold that a police officer acts at his peril in serving a warrant, the court of appeals adopted a more moderate view. The court decided that “where an officer executes a warrant, and believes in good faith that the person taken into custody is the person named in the warrant, the officer will not be civilly liable in an action for false imprisonment absent circumstances tending to suggest that the wrong person has been arrested.”⁵³ The court of appeals found that the trial court had essentially applied the good faith test, but that it was mistaken in granting summary judgment for the police.⁵⁴ The plaintiff’s repeated protestations over being arrested and his requests to “check it out” clearly created a genuine issue of material fact as to whether or not information was presented to the police officers tending to negate their belief that they had arrested the right man.

2. *Guest Statute Inapplicable to Watercraft*.—In *Clipp v. Weaver*,⁵⁵ the Indiana Supreme Court considered the possible application of the motor vehicle guest statute⁵⁶ in a novel factual context. The plaintiff’s decedent was a passenger in a motorboat driven by Weaver. Weaver’s boat collided with another and the plaintiff’s decedent was killed. One argument asserted by the defendant was that Indiana’s motor vehicle guest statute ought to apply in cases involving accidents between water-

⁵²450 N.E.2d 1030 (Ind. Ct. App. 1983).

⁵³*Id.* at 1033.

⁵⁴*Id.*

⁵⁵451 N.E.2d 1092 (Ind. 1983).

⁵⁶The court considered the possible application of IND. CODE § 9-3-3-1 (1980) (current version at IND. CODE § 9-3-3-1 (Supp. 1984)). Since the decision in *Clipp* was rendered, the guest statute has been amended. The term “guest” has been limited to hitchhikers or members of the operator’s family. IND. CODE § 9-3-3-1 (Supp. 1984). The amended version of the guest statute would have been clearly inapplicable to the facts in *Clipp*. For a more extensive discussion of the guest statute’s amendments, see Arthur, *Insurance, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 265, 287-88 (1985).

craft. Obviously, plaintiffs in such cases would be in a much more difficult position if the guest statute applied, because the legal standard that must be proven is that the defendant acted with willful and wanton disregard of the safety of his passenger. If the guest statute does not apply, however, only the ordinary negligence standard of a lack of reasonable care need be proven.

In refusing to extend the reach of the guest statute to watercraft, the supreme court noted that the legislature had specifically applied the willful and wanton standard to aircraft.⁵⁷ Because the legislature had not specifically applied the standard to boats, the court saw no reason to extend the statute judicially to cover boats.⁵⁸ The court observed that boat operators are normally far more aware of the potential dangers associated with boats than are their passengers. Further, the court focused on the language of the watercraft statute requiring that all boats shall be operated "in a careful and prudent manner."⁵⁹ According to the court, this language and similar references in other sections of the watercraft statute indicated a legislative intent that an ordinary care standard, not a willful and wanton standard, ought to be applied in all accidents involving watercraft, whether the victims may be passengers or others.⁶⁰

3. *Governmental Immunity: Scope of Defense for Firefighters.*—In *City of Hammond v. Cataldi*,⁶¹ two restaurant owners sued the City of Hammond on the theory that the city's negligence in fighting a fire at the restaurant resulted in its complete destruction. Although city firefighters did attempt to contain the blaze, the plaintiffs alleged that the fire department failed to control the fire due to negligent training, supervision, and administration of the department by the officials in charge; failed to allocate men properly to the equipment on hand; and failed to have enough equipment or manpower. Additionally, the plaintiffs accused the city of spreading the fire through negligent firefighting methods.

The city moved for summary judgment on the theory that all the actions taken by the fire department in fighting the fire were discretionary and that the city was therefore immune from suit under the Indiana Tort Claims Act,⁶² which provides in part that governmental entities or their employees acting within the scope of their employment are not liable if a loss results from the performance of a discretionary function.⁶³ The trial court denied summary judgment.

⁵⁷See IND. CODE § 8-21-5-1 (Supp. 1984).

⁵⁸451 N.E.2d at 1094.

⁵⁹IND. CODE § 14-1-1-16 (1982).

⁶⁰451 N.E.2d at 1094.

⁶¹449 N.E.2d 1184 (Ind. Ct. App. 1983).

⁶²IND. CODE § 34-4-16.5-1 to -19 (1982 & Supp. 1984).

⁶³*Id.* § 34-4-16.5-3(6) (Supp. 1984).

In an unusual procedural move, the court of appeals agreed to review the trial court's denial of summary judgment on interlocutory appeal. The decision of the trial court was reversed, and summary judgment was granted. The appellate court relied upon prior law establishing a distinction between "discretionary" and "ministerial" acts.⁶⁴ A duty is discretionary if it involves judgment as to whether or not to perform a certain act. In contrast, a duty is ministerial if it is performed without the exercise of judgment as to the propriety of the act being done. The court concluded that the plaintiff's allegations failed to show on their face that the actions complained of were ministerial and not discretionary.⁶⁵

The analysis of the court of appeals, resulting in the grant of a summary judgment, is questionable. Admittedly, the complaint in this matter was not drafted as carefully as it might have been. However, the requirements of notice pleading were met by the allegation of "erroneous and negligent fire fighting methods."⁶⁶ There was at least some possibility, based upon the facial allegations of the complaint, that ministerial actions took place. Moreover, the court of appeals seemingly allocated the burden of proof improperly. The governmental immunity doctrine and its variations constitute an affirmative defense, and the mere possibility that ministerial actions could have occurred in the course of fighting the fire should have sufficed to preserve the complaint from a motion for summary judgment based on these governmental immunity grounds.

E. Proximate Causation

While there were no sharp departures from existing precedent in the area of proximate causation, there were several opinions in this area which cogently restated the law in a tort context. Perhaps the most comprehensive of these was *Colaw v. Nicholson*,⁶⁷ where Judge Neal authored a thoughtful and scholarly exposition on the proximate cause issue. In *Colaw*, a head-on collision occurred between two cars on a two-lane highway. The plaintiff's decedent was thrown from his vehicle; he fell into the westbound lane of the highway, still alive but badly injured. A few minutes later, defendant Nicholson, traveling in the eastbound lane toward the scene of the accident, saw one victim walking in the middle of the road and swerved into the westbound lane to miss

⁶⁴From a policy standpoint, this distinction does not appear very satisfactory as a basis for governmental immunity. It simply invites buckpassing by those involved, because it will be a defense if they say they were merely following orders.

⁶⁵449 N.E.2d at 1187.

⁶⁶*Id.* at 1186 (quoting the trial court record at 11-12).

⁶⁷450 N.E.2d 1023 (Ind. Ct. App. 1983).

him. Consequently, Nicholson ran over the plaintiff's decedent. The decedent died shortly thereafter from multiple injuries and shock.

Over objection, the trial court admitted evidence that the plaintiff's decedent was thoroughly intoxicated at the time of the accident, his blood alcohol level being approximately two and one-half times the legal limit. The plaintiff's objection was based on relevance: as a result of the initial collision, the decedent was lying helpless in the highway and was no different than a sober person who is so injured.

The court of appeals viewed the plaintiff's objections as an assertion that the second impact was an intervening and superseding force which would terminate any contributory negligence in the form of intoxication.⁶⁸ The court then analyzed and commented upon some of the leading Indiana proximate cause cases. This historical analysis led to the conclusion that a variety of factors may contribute to or determine the result in a particular case involving sequential accidents, including the element of timing and the conditions involved in the original accident.⁶⁹ The court suggested that because the first collision occurred on a dark, rainy, and foggy night, it was reasonably foreseeable that other motorists might run into the wreck. Thus, the negligence causing the first collision continued, and any evidence of intoxication bearing on negligence or contributory negligence was admissible over an objection of relevance.⁷⁰

The leading case of *Slinkard v. Babb*,⁷¹ which is important to defendants for its statement of the "mere condition" rule,⁷² was reinforced as the law of Indiana in *Havert v. Caldwell*.⁷³ In *Havert*, the plaintiff, a police officer, pulled his police car into a parking lane. Another car abruptly stopped behind the police car and was promptly struck in the rear by defendant Caldwell's car. The police officer and the driver whose car had been struck moved to inspect the damage. While the two men were standing between the cars which had collided, a drunken driver coming down the parking lane struck the back of the rearmost vehicle, creating a chain reaction which pinned the two men between the two automobiles which had been involved in the initial collision. The officer sued the drunken driver and also sued Caldwell,

⁶⁸*Id.* at 1026.

⁶⁹*Id.* at 1029.

⁷⁰*Id.*

⁷¹125 Ind. App. 76, 112 N.E.2d 876 (1953).

⁷²The "mere condition" rule, enunciated in *Slinkard v. Babb*, provides that if the defendant's acts do no more than furnish a condition by which the subsequent injury to the plaintiff is made possible, the defendant's acts cannot be held to be the proximate cause of the plaintiff's injuries. *Id.* at 85, 112 N.E.2d at 880.

⁷³452 N.E.2d 154 (Ind. 1983). For a further discussion of this case, see Pardieck, *The Impact of Comparative Fault in Indiana, Symposium on the Indiana Comparative Fault Act*, 17 IND. L. REV. 925, 931 n.34 (1984).

the driver of the rearmost car which had been involved in the initial collision.

Caldwell moved for partial summary judgment and the trial court granted the motion. The Indiana Court of Appeals reversed the grant of partial summary judgment and remanded for further proceedings.⁷⁴ The supreme court granted Caldwell's transfer petition, vacated the opinion of the court of appeals, and reinstated partial summary judgment in favor of Caldwell. The supreme court found that Caldwell's act of negligence in driving into the rear of the car ahead of him was not the proximate cause of the injury to the police officer, even though it might be said that Caldwell's act "set in motion the chain of events" that ended in the injuries to the officer.⁷⁵ According to the supreme court, it was not reasonably foreseeable that a drunken driver would proceed down a parking lane and collide with a car already situated in that lane in the same manner as any legally parked car would have been.⁷⁶ In effect, the activity of the drunken driver was an intervening cause which broke the chain of causation between the original negligence of Caldwell and the injuries to the police officer. It is perhaps significant, however, that the court avoided the use of the "mere condition" language which marks the *Slinkard* decision.

These cases serve to emphasize that while the fundamental principle of proximate causation, the test of reasonable foreseeability, is easily stated, it is by no means easy to apply in many factual situations. Because the test ultimately amounts to a policy decision, the courts usually avoid the resolution of proximate cause issues as matters of law and leave them to the jury.

F. Damages

1. Property Damage Rule Where Property is Repairable or Restorable.—In *Hann v. State*,⁷⁷ the Indiana Court of Appeals considered a small property damage judgment in favor of the state. The court acknowledged the long-standing rule in Indiana that if personal property has been damaged by the fault of another but is repairable, the measure of damages is the difference in the fair market value of the property immediately before and immediately after the event in question plus any amount "reasonably expended" as a proximate result of the wrongful act.⁷⁸

At issue in *Hann* was the type of evidence required to prove the before and after value of the damaged property. The state argued that

⁷⁴Hook v. Caldwell, 426 N.E.2d 708, 711 (Ind. Ct. App. 1981).

⁷⁵452 N.E.2d at 158.

⁷⁶*Id.* at 159.

⁷⁷447 N.E.2d 1144 (Ind. Ct. App. 1983).

⁷⁸*Id.* at 1146.

repair bills alone would constitute prima facie evidence of the difference between the vehicle's before and after fair market values, and contended that when the plaintiff presents such evidence, the burden of refuting it or showing that such costs are unreasonable shifts to the defendant. Refusing to accept the state's "burden-shifting" argument, the court of appeals adopted a rule which allows a plaintiff a choice in proving damages where the property is repairable or restorable. The plaintiff may prove the difference between the fair market value immediately before and immediately after the event in question, or may submit evidence of the cost to repair or restore the property.⁷⁹ If a plaintiff elects to submit evidence of repair costs, the evidence must be accompanied by proof of the actual physical damage to the property, plus proof that the cost of repair was reasonable and that it bore a "reasonable relationship to the difference between the fair market value of the property just before and just after the traumatic event."⁸⁰

2. *Punitive Damages: Malice Requirement Extended to Tort Actions.*—In *Miller Pipeline Corp. v. Broeker*,⁸¹ the court of appeals extended the malice requirement imposed in contract actions⁸² to punitive damage awards in the tort field. *Broeker* arose out of a rear end collision which resulted when the defendant's brakes failed. During the ten day period prior to the accident, the red brake warning light had been lighted on the defendant's truck. Furthermore, for several days before the accident, the brakes had seemed increasingly unreliable, particularly during the afternoon hours. The truck had been taken to the defendant's maintenance department, where the problem was reported to a mechanic on the day before the collision. The mechanic checked the brake fluid level and checked the pedal for pressure, determined that the truck had brakes at the moment, and conducted no further examination or repairs. The plaintiff's expert testified that the brake defects responsible for the collision did not occur suddenly and could have been discovered before the accident had the mechanic inspected the brakes more thoroughly. A judgment for compensatory and punitive damages resulted.

In reversing the punitive award, the court of appeals rejected the plaintiff's contention that no showing of malice, ill will, or intentional wrongdoing was necessary. The plaintiff argued that a showing that the defendant acted "willfully in an abusive, wanton or oppressive manner

⁷⁹*Id.* at 1147.

⁸⁰*Id.* In other words, it is incumbent on the plaintiff, should he elect to prove damages by submitting evidence on the cost of repair, to present proof as to (1) the damage sustained; (2) the reasonableness of the cost of repair; and (3) the relationship of the cost of repair to fair market value.

⁸¹460 N.E.2d 177 (Ind. Ct. App. 1984).

⁸²*E.g.*, *Prudential Ins. Co. v. Executive Estates*, 174 Ind. App. 674, 369 N.E.2d 1117 (1977).

in heedless disregard of the consequences”⁸³ should suffice to support a punitive verdict. The court of appeals responded that “heedless disregard of the consequences” is simply not enough to justify the imposition of punitive damages.⁸⁴ Because the defendant did not send the truck out on the road knowing that there were uncorrected defects, the court of appeals concluded that the defendant lacked the requisite malicious state of mind required by *Prudential Insurance Co. v. Executive Estates*.⁸⁵ The court conceded that the defendant’s conduct may have manifested a heedless disregard of the consequences, or at least more than a mere failure to exercise reasonable care. However, there was no proof that the defendant engaged in the sort of reprehensible conduct that implied a “consciousness of intended or probable effect calculated to unlawfully injure the personal safety or property rights of others.”⁸⁶

The *Miller Pipeline* decision, taken together with the “clear and convincing evidence” standard enunciated in *Travelers Indemnity Co. v. Armstrong*,⁸⁷ appears to clarify greatly the standard of proof required to justify punitive damages in Indiana tort cases. Obviously, the standard is not an easy one to meet.

G. Conclusion

During the survey period, Indiana decisions in the torts field continued to reflect the judiciary’s reluctance to engage in judicial legislation. The torts field is, nonetheless, changing. Increasingly, remedies in the legislature are being sought and obtained where the courts have refused to legislate. While Indiana courts are often castigated for their aversion to legislating, they should be commended for their continuing efforts to preserve the balance between the branches of state government, and for recognizing that the legislature, as the branch of government most closely responsible to the people, should take the lead in debating and implementing far-reaching changes in Indiana tort law.

⁸³460 N.E.2d at 179.

⁸⁴*Id.* at 185.

⁸⁵174 Ind. App. 674, 369 N.E.2d 1117 (1977), *cited in Miller Pipeline*, 460 N.E.2d at 185.

⁸⁶460 N.E.2d at 180 (quoting *Hibschman Pontiac, Inc. v. Batchelor*, 340 N.E.2d 377 (Ind. Ct. App. 1976) (Garrard, J., concurring)).

⁸⁷442 N.E.2d 349 (Ind. 1982).

XV. Trusts and Decedents' Estates

DEBRA A. FALENDER*

KRISTIN G. FRUEHWALD**

A. Decedents' Estates

1. *Illegitimate's Entitlement to Survivor's Allowance.*—In *In re Estate of Hendren*,¹ a case of first impression in Indiana, the Indiana Court of Appeals¹ held that a child who was not born in wedlock and not determined to be a deceased father's child by court order was entitled to an allowance from the deceased father's estate.² Indiana law provides that if a decedent has no surviving spouse, the decedent's children who are under the age of eighteen years are entitled, collectively, to an allowance of \$8,500 from the deceased parent's estate.³ Indiana law further provides that an illegitimate child shall be treated the same as if he were a legitimate child of the father if the paternity of the child "has been established by law" during the father's lifetime.⁴

In *Hendren*, a paternity action was initiated during the father's lifetime and prior to the child's birth. Blood tests indicated a ninety-six percent probability that the alleged father was the child's biological father. The child's mother and the alleged father reached an agreement which, among other matters, stated that the alleged father was the child's biological father. An order embodying that agreement was prepared but was marked "denied" by the trial court because of its provisions concerning social security benefits. The order was resubmitted but was not entered until three days after the alleged father's death.⁵ An allowance was awarded in the father's estate, and the executors appealed on the basis that the statutory language "has been established by law" meant that the father had to be determined to be the child's father *by court order* prior to the father's death.⁶

An analysis of several United States Supreme Court cases on the issue disclosed that judicial determinations of paternity are desirable

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¹459 N.E.2d 437 (Ind. Ct. App. 1984).

²*Id.* at 442.

³IND. CODE § 29-1-4-1 (1982).

⁴IND. CODE § 29-1-2-7(b) (1982).

⁵459 N.E.2d at 438.

⁶*Id.* at 439.

because of the peculiar problems of proof in establishing paternity and the desirability of having these proof problems resolved in an adversarial setting, a setting which permits the father an opportunity to respond.⁷ After analyzing these cases, the *Hendren* court noted the constitutional problems involved in statutes affecting illegitimates and determined that the desire to allow fathers to protect themselves against fraudulent claims must be balanced against the illegitimates' rights to reasonable opportunities to establish paternity.⁸

The court found that Indiana's statute promoted accuracy and fairness by ensuring that determinations of paternity take place in adversarial contexts.⁹ To balance this requirement in the instant case against the child's rights to an opportunity to determine paternity, the court decided that the policy behind the statute had been served since an adversarial context had existed and, except for the entry of a decree, a resolution had been reached during the father's lifetime. Since the statute's purpose had been fulfilled, the child was entitled to an allowance from his father's estate even though a timely decree determining paternity had not been entered.¹⁰

Judge Hoffman dissented on the very point with which the authors of the majority opinion had difficulty—the clear language of the statute required the entry be made during the father's lifetime.¹¹ The majority circumvented the actual language of the statute by looking through the form of the statute to its substance.¹² Judge Hoffman found no basis for ignoring the clear statutory language since the statute was presumptively constitutional as written¹³ and had to be strictly construed because it was in derogation of the common law.¹⁴ In spite of the appealing facts of this case, Judge Hoffman believed that the majority's decision opened the door to paternity litigation after a father's death. He further believed that if the language of the statute were flawed, the Indiana legislature must change it.¹⁵

⁷See *Lalli v. Lalli*, 439 U.S. 259 (1978) (The Supreme Court upheld the constitutionality of a New York statute which required that a judicial determination of paternity be entered during a father's lifetime before an illegitimate was entitled to inherit.). See also *Trimble v. Gordon*, 430 U.S. 762 (1977).

⁸459 N.E.2d at 441 (citing *Pickett v. Brown*, 103 S. Ct. 2199, 2204-05 (1983); *Mills v. Habluetzel*, 456 U.S. 91, 99-101 (1982)).

⁹459 N.E.2d at 442.

¹⁰*Id.*

¹¹*Id.* (Hoffman, J., dissenting).

¹²*Id.*

¹³*Id.* at 443. Judge Hoffman noted that not only are statutes presumed to be constitutional, no party in the instant case was asserting that the statute was unconstitutional. *Id.* Moreover, the Supreme Court upheld a statute similar to Indiana's in *Lalli v. Lalli*, 439 U.S. 259 (1978).

¹⁴459 N.E.2d at 443 (citing *Reger v. Reger*, 242 Ind. 302, 316, 177 N.E.2d 901, 907 (1961)).

¹⁵459 N.E.2d at 444.

2. *Antenuptial Agreements and Waivers of Expectancy*.—The importance of complying with statutory requirements respecting antenuptial agreements and waivers was evident in the case of *Bohnke v. Estate of Bohnke*.¹⁶ In *Bohnke*, the husband's estate tried to limit the wife's interests in the estate by requesting court enforcement of a written waiver of expectancy, an oral antenuptial agreement, and a written "rental agreement" disposing of certain funds deposited by the husband and wife in nursing home accounts.¹⁷

A waiver of expectancy was executed by the wife shortly after her husband's death. In this waiver, the wife waived her right to an elective share of her husband's estate and her right to the \$8,500 survivor's allowance. The waiver itself did not contain a listing of the wife's rights; it merely contained a statement that the wife had been "fully informed as to [her] rights in the estate of [her] deceased husband, Frank E. Bohnke, and as to the provisions of I.C. 29-1-3-1 and [her] right to survivor's allowances as provided in I.C. 29-1-4-1."¹⁸ The court held that this waiver was not enforceable with respect to the survivor's allowance because Indiana law requires that, to be valid, a waiver of an expectancy can be made only after full disclosure of the nature and extent of the rights being waived.¹⁹ Disclosure is also required with respect to a waiver of the right to elect against a decedent's estate.²⁰ The court reasoned that the allusion in the waiver to the wife's statutory rights, which was unaccompanied by a discussion of the nature of those rights, was not a sufficient disclosure of the nature of those rights.²¹ Because the wife was not advised of her statutory right to elect against the decedent's estate or of her right to obtain a survivor's allowance when the waiver was signed, the waiver was not valid.²²

The court also noted that the fact that the husband and wife had an alleged underlying oral agreement between them in which each agreed not to make any claim on the estate of the other did not convert the invalid waiver into a valid one.²³ While antenuptial agreements are generally favored, Indiana law requires that these agreements be made in writing and that they be signed only after a full disclosure of the

¹⁶454 N.E.2d 446 (Ind. Ct. App. 1983), *transfer denied*, Jan. 30, 1984.

¹⁷*Id.* at 448.

¹⁸*Id.* at 449 (quoting the disputed waiver).

¹⁹*Id.* at 448 (citing IND. CODE § 29-1-2-13 (1982)). The survivor's allowance was an "expectancy" and its waiver was, hence, governed by the general rules with respect to waivers of expectancies. Because no statutory provision provides for a method for withdrawing waivers, they are generally irreversible if they comply with statutory requirements. 454 N.E.2d at 448.

²⁰454 N.E.2d at 448 (quoting IND. CODE § 29-1-3-6 (1982)).

²¹454 N.E.2d at 449.

²²*Id.*

²³*Id.* at 450.

rights being waived.²⁴ Since the antenuptial agreement was not in writing, the court held that it failed to meet the statutory requirement, was not enforceable, and could not be used to validate a subsequently written, but invalid, waiver.²⁵

The court also ruled that the rental agreement was not an enforceable antenuptial agreement with respect to the amounts subject to the rental agreement.²⁶ While the rental agreement was in writing and was signed by both the husband and wife, it merely provided that the balance of each of their accounts at the nursing home would pass to each of their estates. It contained no other language by which the parties waived their rights with respect to each other's estate, and the court found that this requisite language could not be implied. The court concluded that the agreement clearly did not constitute an agreement that the survivor would make no claims on the estate of the first to die and was not, therefore, an enforceable antenuptial agreement.²⁷

Another issue concerning antenuptial agreements faced the court in the case of *Russell v. Walz*.²⁸ There, the antenuptial agreement was entered into by the parties prior to marriage, was in writing, and was presumptively effective. The agreement gave the decedent's wife the right to one-third of the decedent's net estate if he predeceased her. At the time of the execution of the agreement, the decedent owned two parcels of real estate which would have been subject to the wife's one-third share under the agreement. After the execution of the agreement, and before death, the decedent arguably gave one parcel of real estate to his children. If the gift were found to be effective, the main issue in the case would have been whether the gift served to extinguish the wife's rights under the agreement to one-third of that property, or whether the gift was in fraud of the agreement and was, therefore, ineffective to extinguish her rights.²⁹

The court noted the following generally recognized rules concerning antenuptial agreements: (1) antenuptial agreements are generally favored by the courts and will, when possible, be liberally construed;³⁰ (2) consideration will be given to the language in the agreement, the conditions surrounding the parties at the time the agreement is made, the legal rights of the parties as they would exist before and after the marriage

²⁴IND. CODE § 29-1-3-6 (1982).

²⁵454 N.E.2d at 450.

²⁶*Id.*

²⁷*Id.*

²⁸458 N.E.2d 1172 (Ind. Ct. App. 1984). For a further discussion of this case, see Krieger, *Property, 1984 Survey of Recent Developments in Indiana Law* 18 IND. L. REV. 347, 350-58 (1985).

²⁸458 N.E.2d 1172 (Ind. Ct. App. 1984).

²⁹*Id.* at 1174-78.

³⁰*Id.* at 1179 (citing *Baughner v. Barrett*, 128 Ind. App. 233, 238-39, 145 N.E.2d 297, 299 (1957), *transfer denied*, Jan. 30, 1958; *Moore v. Harrison*, 26 Ind. App. 408, 411, 59 N.E. 1077, 1077-78. (1901)).

if no agreement were made, and the adequacy of the consideration supporting the agreement;³¹ and (3) agreements will only be enforced if they are executed and performed with the utmost good faith.³² In two conclusions on property law grounds,³³ the court found that the decedent's inter vivos conveyance was ineffective to transfer title to the real estate.³⁴ The court noted, however, that had the conveyance effected a valid inter vivos transfer, the transfer was susceptible to an argument that it was fraudulent and in violation of the wife's rights under the antenuptial agreement.³⁵

Under the court's suggested argument, a wife would benefit greatly by having an antenuptial agreement similar to the one in *Russell* since she arguably is then entitled to share in any property disposed of by her husband prior to his death. Under Indiana elective and intestate law, she would be entitled only to an intestate or elective share of the decedent's probate estate as it exists at death, without regard to predeath and nonprobate transfers.³⁶ Even if the decedent effectively disposed of some property prior to death, a spouse cannot increase his or her elective or intestate portion of the estate through "augmentation"—the estate's inclusion of nonprobate property for the purposes of determining the size of the elective or intestate share—since Indiana has rejected this concept even when predeath transfers are intended to defeat a surviving spouse's rights.³⁷ By having an antenuptial agreement, and under the

³¹458 N.E.2d at 1180 (quoting *Baughner v. Barrett*, 128 Ind. App. 233, 239, 145 N.E.2d 297, 300 (1957), *transfer denied*, Jan. 30, 1958)).

³²458 N.E.2d at 1180 (citing *Kratli v. Booth*, 99 Ind. App. 178, 182, 191 N.E. 180, 182 (1934)).

³³For a discussion of the property issues involved in the *Russell* case, see Krieger, *Property*, 1984 *Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 347, 352 (1985).

³⁴458 N.E.2d at 1184.

³⁵*Id.* at 1184-85. The court reached this conclusion in spite of language in the agreement which gave each of the parties "the full right to own, control, and dispose of his or her separate property the same as if the marriage relations did not exist, and each of the parties is to have full right to dispose of and sell any and all real or personal property." *Id.* at 1175 (quoting the antenuptial agreement). Although the court did not specifically consider this language, the fact that the agreement did not mention gifts or sales for less than an adequate consideration may indicate that the parties did not intend that a survivor's rights could be defeated through gifts.

³⁶IND. CODE §§ 29-1-2-1, -3-1 (1982).

³⁷See *Leazenby v. Clinton County Bank & Trust Co.*, 171 Ind. App. 243, 355 N.E.2d 861 (1976). The rule was firmly established in *Leazenby* that a spouse has no right to reach property held in a deceased spouse's inter vivos revocable trust. *Id.* at 252, 355 N.E.2d at 866. This is true even if the trust were created for the sole purpose of defeating the surviving spouse's lawful rights. *Id.* at 251-52, 355 N.E.2d at 865. If, however, the trust is invalid for some reason, it can be set aside. As the *Leazenby* case indicates, inter vivos validity is of crucial importance in determining whether or not the inter vivos transfer is effective. In *Leazenby*, the transfer was effective because the decedent's husband had no rights in the decedent's property during the decedent's lifetime; he had only an

court's reasoning in *Russell*, a spouse could "lock in" his or her interests in the decedent's estate regardless of any attempt by the decedent to defeat the spouse's rights. This provides the surviving spouse with substantial protection against a deceased spouse's predeath transfers.

3. *Decedent's Disposition of Property Not Owned by the Decedent.*— In *Apple v. Kile*,³⁸ one issue was whether or not a decree in final settlement of an estate was a final judgment with respect to all property inventoried in the estate and was binding on all interested parties.³⁹ Indiana law states that a decree in final judgment in an estate binds all interested parties with respect to the matters set forth therein unless for fraud, mistake, or otherwise the probate court modifies or vacates the order within one year.⁴⁰ The *Apple* case was not concerned with a probate court's modification of its decree, but rather with a collateral attack on the decree in a quiet title action.

In *Apple*, the father died in 1958, leaving a will which devised a thirty acre tract of land to his daughter, Kile. Kile's brother, Apple, served as the executor of his father's estate and sent notice of the probate proceedings to Kile. Under the belief that the thirty acre tract was jointly owned by his father and mother, Apple neither inventoried the property nor distributed it during the course of the estate proceedings. The father's estate was duly closed and the mother continued in possession of the tract until her death in 1975. The mother's will devised the thirty acre tract to Apple. The real estate was inventoried in the mother's estate and was distributed, under a final decree, from the estate in 1976.⁴¹

Because these transactions created a flaw in the chain of title which surfaced when Apple attempted to secure a loan on the tract, he attempted to obtain a quit claim deed from Kile. This put Kile on notice of her interest in the tract, and she filed a quiet title action to determine the title to the real estate.⁴² The trial court, relying on the equitable doctrine of unclean hands, held that Apple had a duty to distribute the property from his father's estate to the person entitled thereto. Having failed to perform his statutory duty, the trial court held that he could not now

expectancy. The transfer could not, therefore, be in fraud of his rights. *Id.* at 251, 355 N.E.2d at 865. In *Russell*, arguably and ignoring the quoted language in *supra* note 19, the wife had more than an expectancy. She had a right under the agreement to one-third of the decedent's property. Because the transfers were designed to defeat actual, not expectant, property interests, the court's argument would allow the transfers to be set aside simply on the basis that they were not valid inter vivos transfers even if they had not, on property law grounds, been otherwise ineffective. For a complete discussion of the *Leazenby* case, see Falender, *Protective Provisions for Surviving Spouses in Indiana: Considerations for a Legislative Response to Leazenby*, 11 IND. L. REV. 755 (1978).

³⁸457 N.E.2d 254 (Ind. Ct. App. 1983), *transfer denied*, Mar. 16, 1984.

³⁹*Id.* at 258.

⁴⁰IND. CODE § 29-1-1-21 (1982).

⁴¹457 N.E.2d at 255.

⁴²*Id.*

profit by his wrongdoing and was estopped to claim title to the property through his mother's estate.⁴³

The court of appeals found that a decree of distribution has no applicability to property not owned by a decedent and is, *ab initio*, totally ineffective to determine title to any such property.⁴⁴ Because a probate court can only determine who is entitled to property owned by the decedent, administration and distribution of an asset not owned by the decedent cannot serve to pass title.

The court did note one exception to this general rule, and that is if the probate court has addressed the question of title in a manner presumably notorious enough to advise the person whose property is being administered of that person's rights to the property.⁴⁵ The court did not directly address several Indiana cases which hold that a decedent may devise property which he does not own.⁴⁶ These cases do not rely upon the finality of a probate court's distribution of the property, but rather rely upon an equitable election made when a person agrees to allow a decedent's will to dispose of property owned by that person in exchange for other benefits that person receives under the decedent's will. If that person does not so agree, he is forced to elect against the will to retrieve his property from the decedent's estate and cannot then accept any of the other benefits under the will. For property to be disposed of in this manner, the testator must intend to dispose of property belonging to another; the property must be specifically mentioned in the will; the true property owner must receive benefits under the will; and he or she must not elect against the will.⁴⁷ As this theory applies to the instant case, it is not clear whether or not Kile received any benefits under her mother's will. If she did, this line of Indiana cases would prevent her from receiving these benefits and recovering her property

⁴³*Id.*

⁴⁴*Id.* at 258-59. It is, however, in all other respects a final judgment binding on all parties and it cannot be collaterally attacked more than one year after it is entered. *Id.* at 258.

⁴⁵*Id.* at 256-57.

⁴⁶See *Young v. Biehl*, 166 Ind. 357, 77 N.E. 406 (1906); *Citizens Nat'l Bank v. Stasell*, 408 N.E.2d 587 (Ind. Ct. App. 1980), *reh'g denied*, 415 N.E.2d 150 (1981); *Moore v. Baker*, 4 Ind. App. 115, 30 N.E. 629 (1892). The *Moore* court noted:

[W]hen the testatrix elected to avail herself of the benefits of her husband's will, she was thereby estopped to deny his right to dispose of the bank stock, though the title was in her. The doctrine of election is of equitable origin, and is universally recognized in this country and England. There can be no election unless the testator confers some benefit upon the devisee, and by the terms of the will assumes to dispose of some right of the latter. Election consists in the exercise of the choice thus offered the devisee of accepting the devise and surrendering that right of his which the will undertakes to dispose of, or retaining such right and rejecting the devise.

Id. at 117-18, 30 N.E. at 629-30.

⁴⁷See *Citizens Nat'l Bank v. Stasell*, 408 N.E.2d 587, 592 (Ind. Ct. App. 1980).

at the same time. Because of the equitable nature of this doctrine, however, Kile might be able to prevent its normal operation since her ownership interest in the property was arguably hidden from her through the other claimant's breach of a fiduciary duty.

4. *Will Construction*.—In *Graham v. Anderson*,⁴⁸ the decedent's will left her estate equally to six of her brothers and sisters. Only one of these six brothers and sisters (the mother of the attorney who drafted the will) survived the decedent. The children of the deceased brothers and sisters argued that the bequest to their parents should not lapse, but should pass to them by the laws of intestate succession.⁴⁹

The court first examined the will to determine whether or not it was ambiguous with respect to the identity of the beneficiaries. Because the will did not contain any language which required the bequests to be paid to deceased brothers or sisters or which carried their shares to their descendants, no language was present which would make the will ambiguous.⁵⁰ A will is not, therefore, ambiguous just because beneficiaries named in the will predecease the decedent.

In response to the children's attack on the operation of Indiana's antilapse statute,⁵¹ the court found that the statute did not "save" the bequests in this case and that the resulting lapse which occurred was not contrary to public policy nor in violation of common law principles.⁵² This holding is in line with the clear language of the antilapse statute and in accordance with prior decisions of the Indiana courts.⁵³

⁴⁸454 N.E.2d 870 (Ind. Ct. App. 1983).

⁴⁹*Id.* at 871. The children also attacked the will on the basis of the attorney-draftor's interests in the identity of the decedent's beneficiary under the will. This argument was rejected because, at the time the will was drafted, all but one of the decedent's brothers and sisters were living, and there was no way the attorney could have known who among these would eventually survive the decedent. *Id.* at 872 n.2. While the argument was rejected, it does warrant some attention in that this case, among others, raises some conflict of interest questions which can arise when an attorney drafts a will under which he or a close family member receives a benefit.

⁵⁰*Id.* at 872-73. Indiana case law has long noted a distinction between patent and latent ambiguities and the admissibility of extrinsic evidence to clarify the ambiguities. Patent ambiguities are apparent on the face of a will because the language used in the will either conveys no definite meaning or conveys a confused meaning. No extrinsic evidence is admissible to explain or remove a patent ambiguity. A latent ambiguity arises not on the face of the instrument, but in attempting to apply the words used in the instrument to the facts. Extrinsic evidence is admissible to explain or clarify a latent ambiguity. See *Hauck v. Second Nat'l Bank of Richmond*, 153 Ind. App. 245, 286 N.E.2d 852 (1972) (citing various cases defining the two concepts). After examining the provisions of the will in *Graham*, the court found that there was no ambiguity of either sort since its language was clear and could be applied without difficulty. 454 N.E.2d at 872-73.

⁵¹IND. CODE § 29-1-6-1(g) (1982).

⁵²454 N.E.2d at 873.

⁵³See, e.g., *Carey v. White*, 126 Ind. App. 418, 126 N.E.2d 255 (1955), *transfer denied*, Apr. 17, 1956.

In the case of *Pleska v. Zakutansky*,⁵⁴ the court again dealt with ambiguities in will language, this time with respect to language contained in a will's tax charging clause. The will clause provided that all taxes were to be paid "out of the corpus of my estate."⁵⁵ The decedent's taxable estate included small amounts of probate property and large amounts of jointly held property. Because the taxes imposed on the estate were greater than the value of the probate property, no property would be available for transmittal to the beneficiaries under the will if the tax charging clause were construed so as to require the payment of taxes out of probate property.⁵⁶

The court noted that if language in a will is ambiguous, other language contained in the will can be examined to see if it sheds any light on the testator's intent. Since the will left very specific bequests of probate property to certain distributees in certain specified amounts, the court reasoned that the decedent did not intend to deplete his probate estate by the taxes on nonprobate property, but, rather, intended that property pass under his will to the beneficiaries of his estate.⁵⁷ Read in this light, the tax charging clause that required all the taxes to be paid out of the "corpus of the estate" was not a sufficient direction to require that taxes due on nonprobate property be paid out of the probate estate. Because the will did not provide for an apportionment of taxes, Indiana's tax apportionment statute⁵⁸ was held to control the identity of the source of the tax payments.⁵⁹

This case emphasizes the need for incorporating specific directions with respect to tax apportionment in order to overcome Indiana's tax apportionment statute. If it is intended that taxes on nonprobate property be paid out of the probate estate, this must be specifically stated in the will.

5. *Tax Deduction for Claims Against Estates.*—In the case of *Estate of Thompson v. Commissioner of Internal Revenue*,⁶⁰ the Seventh Circuit Court of Appeals, interpreting Indiana law with respect to what claims are enforceable against an Indiana estate, found that an unfiled claim was enforceable against an estate and, hence, was deductible on a decedent's federal estate tax return.⁶¹ In *Thompson*, the creditor did not

⁵⁴459 N.E.2d 745 (Ind. Ct. App. 1984), *transfer denied*, June 5, 1984.

⁵⁵*Id.* at 747 (quoting the Pleska will).

⁵⁶*Id.*

⁵⁷*Id.* at 748-49.

⁵⁸IND. CODE § 29-2-12-2 (1982).

⁵⁹459 N.E.2d at 749.

⁶⁰730 F.2d 1071 (7th Cir. 1983) (per curiam).

⁶¹*Id.* at 1072. The estate claimed deductibility under § 2053 of the INTERNAL REVENUE CODE OF 1954, as amended. This section only allows a deduction for claims which are enforceable under state law. I.R.C. § 2053(a)(4).

file a claim against the estate within the six month period allowed by statute.⁶² The estate and the creditor, however, entered into a compromise agreement with respect to the claim within the six month period, and this compromise was approved almost five years later by the probate court. The Internal Revenue Service challenged the deductibility of the debt, and the tax court agreed with the Service's position.⁶³

With respect to a debt's enforceability under state law, the Indiana statutes contained two arguably relevant provisions. One provision clearly stated that any payments within six months would be considered proper payments if they were approved by the court in the personal representative's next accounting.⁶⁴ Another provision stated that compromises of claims could be made by an executor, but they did not bind an estate unless the personal representative received either prior authorization or subsequent approval of the compromise.⁶⁵ No compromise made after the six month period was valid unless a claim had been filed in the estate.

Since the estate did not pay the debt within the six month period, the creditor had to rely upon the compromise statute for the enforcement of its claim. The Seventh Circuit found that, since a compromise was entered into within the six month period and the estate did receive subsequent approval by a court of the compromise, the compromise was binding on the estate and was a deductible legal obligation of the estate.⁶⁶

Two prior Indiana cases concerning the enforceability of unfilled debts are distinguishable from *Thompson*. In these cases, the personal representative, or the personal representative's attorney, promised either to pay the debt or to file a timely claim on the claimant's behalf.⁶⁷ The

⁶²IND. CODE § 29-1-14-1 (1971), *repealed by* Act of Apr. 22, 1975, Pub. L. No. 288-1975, 1975 Ind. Acts 1582 (current version at IND. CODE § 29-1-14-1 (1982) (requiring claims to be filed within five months)).

⁶³730 F.2d at 1073-74.

⁶⁴IND. CODE § 29-1-14-19(b) (1971), *repealed by* Act of Apr. 22, 1975, Pub. L. No. 288, 1975 Ind. Acts 1582 (current version at IND. CODE § 29-1-14-19(b) (1982) (requiring payments within five months)).

⁶⁵IND. CODE § 29-1-14-18 (1971), *repealed by* Act of Apr. 22, 1975, Pub. L. No. 288-1975, 1975 Ind. Acts 1582 (current version at IND. CODE § 29-1-14-18 (1982)).

⁶⁶730 F.2d at 1076.

⁶⁷*In re Estate of Ropp*, 142 Ind. App. 1, 232 N.E.2d 384 (1968), *transfer denied*, Mar. 21, 1968; *Donnella v. Crady*, 135 Ind. App. 60, 185 N.E.2d 623 (1962), *transfer denied*, July 3, 1963. The fact that the claimants relied upon the estate's promises to pay their claims was of no help to the claimants since Indiana's claim statute is not a statute of limitations, but is, rather, a nonclaim statute. Compliance with the terms of a nonclaim statute, including its time limitations, is necessary to confer jurisdiction on a court. The *Donnella* court noted:

The rule of waiver or estoppel has no application to a nonclaim statute. As pointed out above, the time element in a nonclaim statute is a part of the right of action itself and is not a defense. Such statutes are not extended by

promises were subsequently repudiated by the estates. In both cases, the Indiana courts found that the debts were not enforceable against the estates as they were not filed in accordance with Indiana law, nor were they paid within the time permitted by law.⁶⁸ The distinguishing factor between these cases and the *Thompson* case was the fact that, in *Thompson*, the estate not only did not repudiate the debt, it compromised it in a timely and binding fashion and continued to acknowledge its existence.⁶⁹

It should be noted that if unfilled claims are compromised within the claims period, but will not be paid until after the period expires, adequate records which reflect the compromise and the date of the compromise should be kept. If at all possible, court approval of the compromised debt should be requested as soon as possible and, ideally, within the claims period.

B. Guardianships

1. Breach of Fiduciary Duty and Presumptions of Undue Influence.—As several cases in this section indicate, Indiana courts do not look kindly upon fiduciaries who benefit from breaches of their duties. The courts are particularly harsh on attorneys who serve in fiduciary capacities and who benefit from breaches of their trusts. This was clearly evident in the case of *Briggs v. Clinton County Bank & Trust Co.*,⁷⁰ wherein an attorney, Briggs, prepared and supervised the execution of various documents just prior to obtaining an appointment of himself as the client's guardian. These documents included: (1) a codicil to the client's will and an affidavit stating that the client wished the attorney to act as her guardian; (2) a legal services agreement in which the client agreed to pay the attorney \$10,000 for all services he might render to her prior to her death, to be paid through a \$1,000 bequest in her will, also prepared by Briggs, and a \$9,000 certificate of deposit to be held jointly by the client and Briggs; and (3) a check on the client's account in the amount necessary to purchase the \$9,000 joint certificate.⁷¹

After several months of being under Briggs' care in the conservatorship proceedings, the client contacted another attorney for the purpose of having Briggs removed as conservator.⁷² Her new attorney filed a

the disability, fraud or misconduct of the parties. The time to act cannot be waived by the parties or lengthened by the court.

Id. at 63, 185 N.E.2d at 625.

⁶⁸*In re Estate of Ropp*, 142 Ind. App. 1, 6-7, 232 N.E.2d 384, 387 (1968), *transfer denied*, Mar. 21, 1968; *Donnella v. Crady*, 135 Ind. App. 60, 65, 185 N.E.2d 623, 625 (1962), *transfer denied*, July 3, 1963.

⁶⁹730 F.2d at 1075-76.

⁷⁰452 N.E.2d 989 (Ind. Ct. App. 1983).

⁷¹*Id.* at 995.

⁷²*Id.*

petition to discharge Briggs as conservator and to appoint a new conservator. Briggs then filed a petition to terminate the conservatorship. This petition was granted by the trial court and Briggs was directed to file his final accounting. In this final accounting, Briggs claimed that he was entitled to fees for services rendered the client during her lifetime and to fees for services rendered during the conservatorship, both as attorney and as conservator. The trial court refused to allow him any fees for services rendered either as attorney or conservator.⁷³

The court of appeals agreed on the basis that a contract entered into between an attorney and client is presumptively invalid as the product of undue influence. To rebut this presumption, an attorney must show that the contract was fair and equitable and that the client freely and voluntarily executed it with full understanding. There must be no hint that the attorney was taking advantage of the client.⁷⁴ In *Briggs*, because of the client's condition and the fact that she was found to be incompetent shortly after the signing of the contract, the presumption of undue influence was not overcome and, therefore, Briggs was not entitled to enforce the contract.⁷⁵

Because the contract for attorney fees could not be enforced, Briggs fell back on a quantum meruit theory to recover fees for services rendered as the client's attorney. Quantum meruit recovery is equitable in nature, so that one must have clean hands in order to gain relief.⁷⁶ Since Briggs exercised undue influence, he did not have clean hands, and he was not, therefore, entitled to equitable relief.⁷⁷

Upon Briggs' contention that he was entitled to fees for services rendered the conservatorship, either as attorney or as conservator, the court denied him any fees because he, as conservator, had breached his fiduciary duty to the ward because of his delay in terminating the conservatorship after the order of termination had been entered.⁷⁸ On the whole, the court concluded that Briggs' conflicts of interest and his behavior during the proceedings were such that his actions were often in his, rather than the ward's, best interests.⁷⁹

In related matters, the court found that an attorney-client privilege exists in conversations between attorneys and clients with respect to their wills.⁸⁰ This privilege continues after the client's death when a claimant

⁷³*Id.* at 996.

⁷⁴*Id.* at 999 (citing *Sweeney v. Vierbuchen*, 224 Ind. 341, 347-48, 66 N.E.2d 764, 766 (1946); *Blasche v. Himelick*, 140 Ind. App. 255, 210 N.E.2d 378 (1965); 7 AM. JUR. 2D *Attorneys at Law* §§ 123-24, 249 (1980)).

⁷⁵452 N.E.2d at 999-1000.

⁷⁶*Id.* at 1004 (citing 27 AM. JUR. 2D *Equity* § 136 (1966)).

⁷⁷452 N.E.2d at 1004.

⁷⁸*Id.* at 1010-11.

⁷⁹*Id.* at 1011.

⁸⁰*Id.* at 1012 (citing *Gurley v. Park*, 135 Ind. 440, 35 N.E. 279 (1893)).

is adverse to the interests of the client, his estate, or his successors.⁸¹ In this case, because Briggs' claim was adverse to his client's successors; the attorney-client privilege applied to exclude any testimony by any attorney regarding the provisions of any prior wills made by the client.⁸²

Finally, the court, disgusted with Briggs' failure to present a cogent summary of his case and with the misleading and outrageously erroneous state of his brief, invoked the damages rule under Appellate Rule 15(G)⁸³ and awarded attorney fees to the client's successors.⁸⁴ While the rule only permits a court to award damages up to ten percent of a judgment, the court found that it could use its inherent equitable powers to award attorney fees even where no damages were awarded when the party has acted in bad faith.⁸⁵

2. *Jurisdiction of Probate Courts.*—The jurisdiction of the probate court was brought into question in the case of *In re Guardianship of Neff*.⁸⁶ Pursuant to Indiana Code section 29-1-18-9, an individual petitioner, against the wishes of a minor's father, sought the appointment of a temporary guardian for the minor in the probate division of the Madison Superior Court. The Madison Superior Court appointed the Madison County Department of Public Welfare as the child's guardian.⁸⁷

The father appealed on the grounds that the entry of this order was an improper exercise of the court's probate jurisdiction, and that such an order could be entered only by a court having juvenile jurisdiction, which was vested in another division of the Madison Superior Court.⁸⁸

The Indiana Court of Appeals, in an odd construction of Indiana Code section 29-1-18-6, reversed the trial court, apparently holding that a probate court *never* has jurisdiction to appoint a guardian for a person who has a natural guardian in Indiana.⁸⁹ This is a patently incorrect construction of the statute because the statute itself gives a court having probate jurisdiction the authority to appoint a guardian for any incompetent "except a minor having a natural guardian in this state *who is properly performing his duties as natural guardian*."⁹⁰ In *Neff*, since the natural guardian was found not to be performing his duties as natural

⁸¹452 N.E.2d at 1012 (citing *Doyle v. Reves*, 112 Conn. 521, 152 A. 882 (1931); *In re Smith's Estate*, 263 Wis. 441, 57 N.W.2d 727 (1953)).

⁸²452 N.E.2d at 1012.

⁸³This rule provides, "If the court on appeal affirms the judgment, damages may be assessed in favor of the appellee not exceeding ten per cent (10%) upon the judgment, in money judgments, and in other cases in the discretion of the court; and the court shall remand such cause for execution." IND. R. APP. P. 15(G).

⁸⁴452 N.E.2d at 1015.

⁸⁵*Id.*

⁸⁶456 N.E.2d 1045 (Ind. Ct. App. 1983), *transfer denied*, Mar. 21, 1984.

⁸⁷*Id.* at 1045.

⁸⁸*Id.* at 1046.

⁸⁹*Id.*

⁹⁰IND. CODE § 29-1-18-6 (1982) (emphasis added).

guardian, the statute should have conferred jurisdiction on the probate court to appoint such a guardian. Nothing in the juvenile code appears to deprive the probate court of this type of jurisdiction.⁹¹

It is possible that the appellate court's reasoning was that, while a probate court has jurisdiction to appoint a guardian for a minor having a natural guardian, a probate court's jurisdiction to determine parental fitness is preempted by the juvenile code. This reasoning would make a juvenile court hearing a prerequisite to the appointment of a guardian for any minor having a natural guardian in the state. Whether the juvenile code actually preempts jurisdiction in this situation is not clear either from the language in the juvenile code or its legislative history. Nonetheless, if the *Neff* court's reasoning was along this line, this reasoning does not appear in the court's opinion which merely states that "[t]he trial court lacked jurisdiction because [the father] is [the child's] natural guardian."⁹²

Judge Ratliff, in his concurring opinion which is probably the most illuminating portion of the court's opinion, points out that the proceeding in this case was, in reality, an action concerning a child in need of services (a CHINS action), and not an action for the appointment of a guardian.⁹³ The true nature of the proceeding was evidenced by the fact that the Madison County Department of Public Welfare was appointed as the child's guardian rather than the individual petitioning for the guardianship. Because the matter was not truly a guardianship matter, but was rather a CHINS action, the juvenile code grants exclusive jurisdiction over this action to a court having juvenile jurisdiction.⁹⁴ It is only with the additional background furnished by the concurring opinion that the result in this case makes any sense. Based on the majority opinion alone, the case represents an unfortunate restriction on a probate court's jurisdiction with respect to guardians of minors.

C. Joint Accounts

In *In re Guardianship of Walters*,⁹⁵ the court of appeals had to determine whether or not the trial court's disposition of a joint account on the death of an incompetent joint tenant was correct. The account was established by a husband and wife but was funded mainly with the wife's assets. The signature card on the account clearly termed the account as joint tenants with rights of survivorship. The card additionally specified that the husband and wife, during their lifetimes, had the rights to those

⁹¹IND. CODE § 31-6-2-1 (Supp. 1984).

⁹²456 N.E.2d at 1046.

⁹³*Id.* at 1047 (Ratliff, J., concurring).

⁹⁴*Id.*

⁹⁵460 N.E.2d 1011 (Ind. Ct. App. 1984).

funds in the account which were attributable to their individual deposits.⁹⁶

When the wife became incompetent, the wife's daughter was appointed as her guardian. She withdrew the wife's funds from the joint account and opened another savings account. The husband objected to this withdrawal and the trial court ordered the reestablishment of the joint bank account under the same terms which controlled the original account.⁹⁷ The guardian did not appeal this decision, the determination of which would have been of great interest.⁹⁸ After the wife's death, the trial court split the balance of the account between the wife's estate and the husband. The husband appealed this decision, asserting that he was entitled to the entire funds on deposit in the account, and the court agreed.⁹⁹

Such a result is clearly mandated by the applicable statute unless clear and convincing evidence of a different intention is presented by the party claiming the account.¹⁰⁰ No such evidence was shown by the cards signed by the parties in this case, and a prior antenuptial agreement was not sufficient to negate the subsequent actions of the wife in creating the survivorship account.

D. Trusts

In *In re Watson*,¹⁰¹ it was determined in a prior proceeding that an income beneficiary of a trust owed money to the trust. The successor trustee of the trust filed an accounting which reflected that the beneficiary's share of undistributed net income was being held as security for repayment of the beneficiary's debt to the trust.¹⁰² The beneficiary

⁹⁶*Id.* at 1012.

⁹⁷*Id.*

⁹⁸The disposition by a guardian of joint account assets was an issue in a recent Indiana case which basically held, under present Indiana law, that a guardian has a duty to take possession of joint accounts and to preserve the incompetent's interests therein for the benefit of the incompetent. *Kuehl v. Terre Haute First Nat'l Bank*, 436 N.E.2d 1160 (Ind. Ct. App. 1982). In *Kuehl*, the guardian withdrew the ward's funds from a joint account and deposited them in another account, presumably in the guardian's name. Because the joint account had survivorship features, it would have passed to the surviving joint owner on the ward's death. Since the funds in the account were withdrawn and kept in an account in the guardian's name, the funds presumably passed to the ward's distributees at death. By making such withdrawals, a guardian can dramatically affect a ward's estate plan. It is questionable whether guardians should be given this power or whether, as in the instant case, they should be required to preserve the account, while having access to the account for the ward's support and maintenance to the extent of the ward's contribution to the account.

⁹⁹460 N.E.2d at 1012.

¹⁰⁰IND. CODE § 32-4-1.5-4 (1982).

¹⁰¹449 N.E.2d 1156 (Ind. Ct. App. 1983).

¹⁰²*Id.* at 1157.

filed objections to the trustee's accounting claiming that the trust terms required the trustee to distribute the income to her, and it was, therefore, a breach of the trust for the trustee to fail to distribute such income. The beneficiary alternatively argued that if it were not a breach of trust, the trust should have applied the withheld income against the debt owed to the trust by the beneficiary.¹⁰³

The court found that there was no doubt that a trustee could set off or withhold a beneficiary's distributive share in order to reimburse the trust for a debt owed to it by a beneficiary. The court also found that there was no breach in the trustee's failure to apply the withheld income against the beneficiary's debt, thereby lessening the impact of interest payments on the debt, because a previous agreement between the trustee and the beneficiary provided that no distributions of income would be made to any beneficiary until all litigation between the parties was completed.¹⁰⁴ Because the court found the beneficiary's arguments to be without merit and frivolous, the court imposed a ten percent penalty.¹⁰⁵

E. The Rule Against Perpetuities: Merrill v. Wimmer

In *Merrill v. Wimmer*,¹⁰⁶ an interesting question was raised concerning the rule against perpetuities.¹⁰⁷ The trial court held that part of a proposed distribution of the corpus of a testamentary trust violated the rule and concluded that the violative portions were totally invalid and void.¹⁰⁸ The court of appeals agreed that parts of the trust provision violated the rule, but did not agree that the violative portions should be totally void.¹⁰⁹ The court of appeals adopted and applied a new doctrine, the equitable doctrine of approximation, to avoid total invalidation of the violative dispositions and to effectuate the transferor's intent.

¹⁰³*Id.* at 1158-59.

¹⁰⁴*Id.* at 1159.

¹⁰⁵See *supra* note 83 and accompanying text. Disgusted with the amount of litigation already generated by the trust beneficiary, the court took the unusual step of looking into the future to see what other possible litigated matters could arise with respect to this trust. The court decided that the beneficiary would challenge the trustee's payment from trust assets of its attorney fees incurred in pursuing the appeal. The court held that these fees were chargeable to the trust income rather than the principal. The beneficiary's interest in the trust would, therefore, bear the brunt of the fees which her litigious nature had caused the trust to incur. 449 N.E.2d at 1160 n.6.

¹⁰⁶453 N.E.2d 356 (Ind. Ct. App. 1983).

¹⁰⁷The common law rule against perpetuities is codified in Indiana at IND. CODE § 32-1-4-1 (1982). See *infra* note 118 and accompanying text.

¹⁰⁸453 N.E.2d at 358. See *infra* notes 113-14 and accompanying text for further explanation of the trial court's ruling.

¹⁰⁹453 N.E.2d at 362.

The following discussion of the *Merrill* case will be divided into three parts. First, the facts of the case will be set forth. Second, the existence of a rule violation will be assumed, and the operation of the approximation doctrine will be explained. Third, the existence of a rule violation will be questioned, and a possible misunderstanding of the rule and its operation will be pointed out.

1. *The Facts*.—The testator, Newell, established a testamentary residuary trust in which he devised the income to his three children, Judith, Dennis, and Walter, during their lives.¹¹⁰ Regarding distribution of the trust corpus, the trust provided:

“E. That when my youngest grandchild reaches the age of twenty-five (25) years, said Trust shall terminate as to two-thirds ($\frac{2}{3}$), of the corpus of said Trust, and that said two-thirds ($\frac{2}{3}$), together with the accumulated income to be credited to said two-thirds ($\frac{2}{3}$) interest, shall be divided as follows, to-wit: One-Third ($\frac{1}{3}$) shall be divided one-half ($\frac{1}{2}$) to my daughter, Judith I. Yarling, and one-half ($\frac{1}{2}$) to her children, share and share alike; One-Third ($\frac{1}{3}$) shall be divided one-half ($\frac{1}{2}$) to my son, Dennis A. Merrill, and one-half ($\frac{1}{2}$) to his children, share and share alike; One-Third ($\frac{1}{3}$) of the corpus of said Trust, together with any accumulated income, to be credited to said one-third ($\frac{1}{3}$) interest, shall be continued in Trust for my son, Walter O. Merrill, and he shall have the income from this Trust for and during his natural life and upon his death, if he has bodily issue, then one-half ($\frac{1}{2}$) of his one-third ($\frac{1}{3}$), in Trust, shall go to his bodily issue and the other one-half ($\frac{1}{2}$) of the one-third ($\frac{1}{3}$), in Trust, or all of said one-third ($\frac{1}{3}$), in Trust, in the event he has no bodily issue, shall go to my grandchildren, living at the time of the termination of said Trust, share and share alike.”¹¹¹

When the testator died, he was survived by his three children and several grandchildren.

The trial court held, and the court of appeals agreed, that the provisions distributing corpus to Judith's children and Dennis' children violated the rule.¹¹² The trial court, after finding this rule violation, eliminated the condition restricting distribution to the time when the

¹¹⁰*Id.* at 358.

¹¹¹*Id.* (quoting the Newell trust).

¹¹²*Id.* at 359. In fact, appellants *conceded* this rule violation and more: “Appellants concede the proposed distribution of two-thirds of the corpus to Judith, Dennis and their children when the youngest grandchild reached 25 violates the rule against perpetuities . . .” *Id.* (citation omitted).

youngest grandchild attained twenty-five and modified the trust by awarding outright one-third of the corpus to Judith and one-third to Dennis.¹¹³ The trial court found that the provision of the trust regarding Walter did not violate the rule and left it intact.¹¹⁴

The court of appeals agreed with the trial court's conclusions regarding the existence of rule violations.¹¹⁵ The court of appeals did not agree, however, with the modification of the provisions in favor of Judith and Dennis, or with the failure to modify Walter's provision.¹¹⁶ In rejecting the trial court's approach, the court of appeals pointed to the testator's clear intent that the ultimate beneficiaries of the corpus of his estate be his grandchildren, not his children.¹¹⁷

2. *The Rule and the Approximation Doctrine.*—The rule against perpetuities is codified at Indiana Code section 32-1-4-1:

An interest in property shall not be valid unless it must vest, if at all, not later than twenty-one (21) years after a life or lives in being at the creation of the interest. It is the intention by the adoption of this chapter to make effective in Indiana what is generally known as the common law rule against perpetuities, except as provided in sections 2, 3, 4 and 5 of this chapter.¹¹⁸

The rule, at common law and as codified in Indiana, deals in possibilities, not probabilities, so that any possibility of vesting after the rule period renders the violative interest void.¹¹⁹ Furthermore, when a gift is made to a class of beneficiaries, such as grandchildren, the traditional all-or-nothing rule requires that the entire class gift stand or fall as a unit.¹²⁰ Thus, if the interest of any potential class member might possibly vest beyond the rule period, the entire class gift is void.

¹¹³*Id.* at 358.

¹¹⁴*Id.*

¹¹⁵*Id.* at 359-60.

¹¹⁶*Id.* at 360.

¹¹⁷*Id.*

¹¹⁸IND. CODE § 32-1-4-1 (1982).

¹¹⁹*See, e.g.,* Bailey v. Bailey, 142 Ind. App. 119, 232 N.E.2d 372 (1967), *transfer denied*, Mar. 29, 1968. *See generally* L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 127, at 264-65 (2d ed. 1966) [hereinafter cited as SIMES]. The rule also does not require certainty of vesting within the rule period. The rule merely requires that the interest vest or fail within the period. In other words, the "vesting decision" must be certain to be made within the rule period or the interest is void. *See generally id.* § 127.

¹²⁰This much criticized rule grew out of the controversial case of Leake v. Robinson, 2 Mer. 363 (1817). *See generally* SIMES, *supra* note 119, § 134, at 289-92. In other words, the class must close within the rule period. Several exceptions have developed to lessen the severity of the rule. *See id.* Some courts have refused to follow this rule. *See, e.g.,* Carter v. Berry, 243 Miss. 321, 330, 140 So. 2d 843, 851 (1962).

In the *Merrill* case, the appellate court, using the all-or-nothing rule and also the presumption of perpetual fertility,¹²¹ reasoned as follows:

Here, it is possible the youngest grandchild may reach the age of 25 years more than 21 years after the death of the lives in being, Newell's children, at the creation of the interests. While the youngest grandchild living at the time of trial was sixteen, Newell's children are all still alive. We are required to presume they are still capable of having more children.

. . . Under the will's terms, it was possible for one or more of Newell's children to outlive him (as they did), and then have a child which would not reach the age of 25 within 21 years of Newell's child's death. Therefore, the possibility exists that grandchild's interest would not vest within the time required by the rule. For that reason, the entire gift fails.¹²²

Following the court's analysis, if the age had been twenty-one instead of twenty-five, there would have been no rule violation. Any afterborn grandchild would necessarily reach twenty-one or not within twenty-one years after the death of his parent, a life in being. Alternatively, if the gift had been limited to the grandchildren alive at the decedent's death who reached age twenty-five, then all of the grandchildren alive at the decedent's death would have been lives in being, and all of them would have reached twenty-five or not within their lives. Thus, the rule against perpetuities would not have been violated.¹²³

The court of appeals was well aware of the modifications that might have rendered the grandchildren's interests valid. The court specifically considered both the age modification and the modification limiting the gift to grandchildren living at the decedent's death as possible ways to effectuate the testator's intent.¹²⁴ Ultimately, the court adopted the latter, using the doctrine of approximation and the following reasoning:

We believe the grandchildren's age requirement of 25 years before distribution of the corpus was to be made indicates Newell believed the trust's distributees then would be mature enough to make responsible decisions concerning the property distributed

¹²¹Traditional rule analysis deals in possibilities. Thus, all persons, whether toddlers or octogenarians, are conclusively presumed to be capable of having children. See, e.g., *Reasoner v. Herman*, 191 Ind. 642, 134 N.E. 276 (1922). See generally *SIMES*, *supra* note 119, § 133, at 287-88. Several states have legislatively altered the rule. See, e.g., ILL. ANN. STAT. ch. 30, § 194 (c)(3)(B) (Smith-Hurd Supp. 1984).

¹²²453 N.E.2d at 359 (citations and footnote omitted).

¹²³Also, if the exact gifts given had been coupled with a saving clause providing that vesting or failing of all interests should be determined no later than twenty-one years after lives in being, the gifts would not have violated the rule.

¹²⁴*Id.* at 362.

to them. A distribution of Newell's property only to those grandchildren alive at his death seems to be the scheme least disruptive of his apparent intent.¹²⁵

The approximation doctrine is to private trusts that violate the rule what cy pres is to charitable trusts.¹²⁶ In applying the doctrine of equitable approximation, the court seeks to effectuate, as near as possible, the dominant intent of the transferor. The exact intent of the transferor cannot be fully carried out because of the rule violation. But if it is possible to discard or modify the "least critical contingency" that gives rise to the rule violation, the court will discard it or modify it to effectuate the dominant intent of the transferor.¹²⁷

Several states have adopted the equitable approximation doctrine to avoid the harsh effects of the rule.¹²⁸ In adopting such a doctrine, the states have reaffirmed the rule itself and the important policies underlying it.¹²⁹ The rule still operates to invalidate interests that vest too remotely and cannot be modified to vest sooner in a manner consistent with the transferor's intent; the rule still sets the limits beyond which a transferor cannot go in placing conditions on the ownership of property. Equitable approximation is merely used to change a violative provision and bring it within these limits.¹³⁰

¹²⁵*Id.*

¹²⁶The court specifically said that the approximation doctrine "is applied to private trusts in the same manner and for the same policy reasons as the cy pres doctrine is used in regard to charitable trusts." *Id.* See IND. CODE § 30-4-3-27(1982). Cy pres is applied to charitable trusts when a particular charitable purpose has become impossible, impracticable, or illegal to carry out, but the settlor has manifested a more general charitable intent that can be carried out by a court-ordered modification of the trust. Cy pres, as codified in Indiana, is only applicable to charitable trusts. 453 N.E.2d at 361.

¹²⁷See generally *In re Estate of Chun Quan Yee Hop*, 52 Hawaii 40, 469 P.2d 183 (1970); *Carter v. Berry*, 243 Miss. 321, 140 So. 2d 843 (1962); *Berry v. Union Nat'l Bank*, 262 S.E.2d 766 (W.Va. 1980).

¹²⁸See, e.g., cases cited at *supra* note 127. See also *Edgerly v. Barker*, 66 N.H. 434, 31 A. 900 (1891). Some courts call this doctrine cy pres, while others call it equitable modification.

¹²⁹The policies underlying the rule have been described as follows: "[T]he rule strikes a fair balance between the desires of the living generation to dispose of the property which it enjoys and the desires of future generations to dispose of the property which they will enjoy." SIMES, *supra* note 119, § 121, at 254. The *Merrill* court, in applying approximation, specifically "endorse[d] the rule and its purposes." 453 N.E.2d at 362 n.6.

¹³⁰The *Merrill* court described the application of the doctrine as a process of will construction, not will modification. 453 N.E.2d at 359-60, 362. Other courts have done the same thing. See, e.g., *Carter v. Berry*, 243 Miss. 321, 140 So. 2d 843, (1962). The *Merrill* court complained that the trial court had "rewritten" the testator's will, something that "it may not do." 453 N.E.2d at 360. Yet, the court of appeals in fact rewrote the testator's will when it applied the approximation doctrine. Any court applying equitable approximation is effectively rewriting the offending will or trust, whether it is willing to admit that fact or not.

In the *Merrill* case, the court described two doctrines that were inapplicable and therefore distinguishable from the approximation doctrine. Cy pres was inapplicable because, as codified in Indiana, it applies only to charitable trusts.¹³¹ The trust in *Merrill* was not charitable. Equitable deviation was inapplicable because, as codified in Indiana,¹³² it permits deviation "from the mechanical means of administration of the trust,"¹³³ and from "administrative detail."¹³⁴ In the *Merrill* case, more than "mere deviation" was involved.¹³⁵

After clearly describing the two doctrines that were inapplicable, the *Merrill* court created some uncertainty when it introduced the approximation doctrine by quoting from *Black's Law Dictionary*: "[T]he 'equitable doctrine of approximation' merely authorizes a court of chancery to vary the details of administration, in order to preserve the trust, and carry out the general purpose of the donor."¹³⁶ This definition is disconcerting because it follows directly on the heels of the court's assertion that more than "mere deviation" from "administrative detail" was involved in the *Merrill* case.¹³⁷ This definition is also disconcerting because other cases cited with approval by the *Merrill* court suggest that more

A court's reluctance to admit that it is engaged in the process of "rewriting" a will is understandable. The reluctance likely stems from the strong traditions and policies underlying statutes mandating that all wills be in writing, signed by the testator, and witnessed in a formal manner. So the argument goes: If a written formalized will is changed after the decedent's death as a result of testimony and other documentation that is less formal than the documentation required to execute a valid will, then the statutory will execution requirements will be rendered meaningless and the policies underlying the execution requirements will be disserved. Yet, if the approximation doctrine itself is acceptable, and if its application is appropriate in a particular case, rewriting of the will is necessarily going to occur.

A court applying equitable approximation should not try to hide the fact that it is modifying or rewriting a decedent's will. It should not attempt to classify its decision as a will construction decision. If the court can truly reach the result it wants by construing the language of the decedent's will, then it does not need the aid of the equitable approximation doctrine. Construction of a will is the process of determining testator's intent when the language of the will is ambiguous. Intent is determined by reading the ambiguous language in light of circumstances surrounding the testator at the time of execution. The language of the will is not changed by the process of construction; the language is merely given meaning. A court that adopts and uses equitable approximation to save a rule-violative provision is going beyond the traditional bounds of will construction and is in fact changing, adding, or deleting language of a rule-violative will to effectuate the decedent's intent as nearly as possible.

¹³¹453 N.E.2d at 361. See *supra* note 126 and accompanying text.

¹³²IND. CODE § 30-4-3-26(a) (1982).

¹³³453 N.E.2d at 361 (quoting *Sendak v. Trustees of Purdue University*, 151 Ind. App. 372, 379-80, 279 N.E.2d 840, 845 (1972)).

¹³⁴453 N.E.2d at 361.

¹³⁵*Id.*

¹³⁶*Id.* (citation omitted) (quoting BLACK'S LAW DICTIONARY 632 (rev. 4th ed. 1968)).

¹³⁷453 N.E.2d at 361.

than mere variance of details of administration is usually involved when approximation is applied. The approximation doctrine has been used frequently to modify substantive conditions precedent to the enjoyment of property, such as age attainment requirements. Reductions in age attainment requirements from age forty to age twenty-one,¹³⁸ and from age twenty-five to age twenty-one,¹³⁹ seem to go beyond mere variance of "details of administration," as described in the *Black's* quote.

It is hoped that the *Merrill* court intended to approve the doctrine as it is generally applied, and not merely the more limited doctrine described in the *Black's* quotation. Other language suggesting the breadth of the doctrine confirms this hope. For example, the court said that the "doctrine has been used frequently in recent years to give effect to a testator's intent when his general purpose, i.e. to create a plan for the distribution of his assets after his death, cannot be effectuated due to some other legal principle such as the rule against perpetuities coming into play."¹⁴⁰ Furthermore, the court stated that the doctrine is to be "applied to private trusts in the same manner and for the same policy reasons as the cy pres doctrine is used in regard to charitable trusts."¹⁴¹

The only specific guidance offered by the *Merrill* court as to the proper circumstances for applying approximation is its statement that the goal is to discern and modify the "least critical contingent" of the violative provision, with the aim of doing "the least violence to the testator's intent."¹⁴² Unlike other courts which have applied the approximation doctrine,¹⁴³ the *Merrill* court found the time of distribution to be a critical contingent.¹⁴⁴ Instead of modifying the age attainment requirement, the court held that the term "grandchild" in the first line of the questionable paragraph of the testator's will¹⁴⁵ was to be taken to mean "grandchild alive at my death."¹⁴⁶

At least two sets of questions arise from the *Merrill* court's discussion of the "least critical contingent." First, what burdens must be met to establish the least critical contingent? Will there be cases where a least critical contingent cannot be discerned, and if so, is approximation

¹³⁸*Edgerly v. Barker*, 66 N.H. 434, 31 A. 900 (1891).

¹³⁹*See, e.g., Carter v. Berry*, 243 Miss. 321, 140 So. 2d 843 (1962).

¹⁴⁰453 N.E.2d at 361-62 (citations omitted). The doctrine is thus not apparently limited to rule-violative cases, but can also be used to remedy other intent-defeating legal principles, such as the rule against accumulations.

¹⁴¹*Id.* at 362. *See supra* note 126.

¹⁴²453 N.E.2d at 362.

¹⁴³*See, e.g., supra* notes 127-28.

¹⁴⁴453 N.E.2d at 362.

¹⁴⁵*See supra* note 111 and accompanying text.

¹⁴⁶453 N.E.2d at 362 (citation and footnote omitted). This "construction" eliminated the possibility that an afterborn grandchild would share in the decedent's estate. *Id.* at n.9.

inappropriate in those cases? Or, will there always be a *least* critical contingent? How are courts to choose between two seemingly equal contingents, such as the age modification and the limitation to living takers in *Merrill*?

Second, does *Merrill* establish that age modification is always or usually less appropriate than some other modification? In other words, does *Merrill* establish, as a presumption or a rule of law, that an age requirement is never or rarely the least critical contingent? The court made the following very general statement: "We believe the grandchildren's age requirement of 25 years before distribution of the corpus was to be made indicates Newell believed the trust's distributees then would be mature enough to make responsible decisions concerning the property distributed to them."¹⁴⁷ Must it now be said that whenever the testator sets an age requirement, he or she probably believed in the importance of attaining that age?

The major shortcomings of the *Merrill* decision all involve its detail rather than its ultimate policy choice. Moreover, these shortcomings are overshadowed by the fact that the court was willing to embrace a logical and equitable tool to eliminate the harshness of the rule against perpetuities while adhering to the rule's laudable purpose of preventing the tying up of property in perpetuity.¹⁴⁸ The court should be applauded for its adoption of equitable approximation.

3. *The Rule Violation.*—Although the *Merrill* court should be applauded for adopting the approximation doctrine, the *Merrill* lawyers should be berated for conceding a rule violation that arguably did not exist.¹⁴⁹ As explained below, there was arguably no rule violation in the provisions in favor of Judith, Dennis, and their children, because there was no express, and probably no implied, condition precedent that prevented the vesting of all their interests within the rule period.

The rule requires that interests must vest or fail to vest within twenty-one years after lives in being at the creation of the interest. Vested is a term of art used to describe a remainder¹⁵⁰ that is subject to no condition precedent to possession and enjoyment other than the natural

¹⁴⁷453 N.E.2d at 362.

¹⁴⁸IND. CODE § 32-1-4-1 (1982). See *supra* text accompanying note 118.

¹⁴⁹See *supra* note 112 and accompanying text. Moreover, there was a rule violation in the provision regarding Walter, although the lawyers and the court agreed there was not. See *infra* note 163 for an explanation of the rule problem with respect to Walter's one-third.

¹⁵⁰See generally SIMES, *supra* note 119, § 11, at 19:

A remainder is a future interest having the following characteristics: (a) it is created in a transferee; (b) it is created simultaneously with a prior estate; (c) it is so limited that it can become a present interest at the termination of the prior interest; (d) the prior interest must be of a lesser duration than the interest of the transferor.

Id.

expiration of the preceding estate.¹⁵¹ Thus, to comply with the rule, a remainder must be or become subject to no condition precedent within twenty-one years after lives in being.

Lives in being must be actual lives in being at the creation of the interest.¹⁵² In the *Merrill* case, because of the fertile octogenarian rule,¹⁵³ the court had to assume that the decedent's children might have had more children after the decedent's death. Thus, the class of decedent's grandchildren was not closed at the decedent's death, and the class could not be considered lives in being. The decedent's children, however, were lives in being; the entire class of children could be lives in being because the class closed physiologically at the decedent's death.

Judith, Judith's children, Dennis, and Dennis' children have future interests, remainders in two-thirds of the corpus of the trust created by the decedent. Their interests were to be paid to them free of trust upon termination of the trust, which was to occur when the decedent's youngest grandchild reached the age of twenty-five. Because of the possibility of afterborn grandchildren who might not reach age twenty-five within twenty-one years after the deaths of all the decedent's children,¹⁵⁴ and because of the rule that class gifts stand or fall as a unit,¹⁵⁵ it is very clear that termination of the trust could possibly occur after expiration of the rule period. The rule, however, is generally not concerned with the duration of trusts.¹⁵⁶ The rule is concerned only with the vesting of interests. Vesting, in turn, depends on the nonexistence of conditions precedent. The interests of Judith, Dennis, and their children arguably were or would be free of conditions, and therefore had vested or would vest well within the rule period.

First of all, the interests of Judith and Dennis arguably were vested at the decedent's death, being subject to no express condition precedent other than the natural expiration of the preceding life estates. Similarly, the interests of Judith's and Dennis' existing children arguably were vested at the decedent's death. Moreover, the interests of potential afterborn children arguably would vest as soon as each afterborn child was born, which would occur within the lives of Judith and Dennis.¹⁵⁷

¹⁵¹See generally *id.* § 90, at 186: "[I]n general, we can say that, if a future interest is subject to no condition precedent, other than the termination of prior estates, however and whenever that may occur, it is vested; otherwise it is contingent." *Id.*

¹⁵²See generally *id.* § 127, at 265-66.

¹⁵³See *supra* note 121 and accompanying text.

¹⁵⁴See *supra* note 122 and accompanying text.

¹⁵⁵See *supra* note 120 and accompanying text.

¹⁵⁶See generally *SIMES, supra* note 119, § 144, at 314: "A trust is not void merely because it may last longer than lives in being plus twenty-one years." *Id.* See also *id.*, § 127, at 264: "The word 'vest' refers to a vesting in interest and not in possession." *Id.* (footnote omitted).

¹⁵⁷Actual periods of gestation may be used to extend the rule period. "[A] person is in being for purposes of the rule against perpetuities at the time he is begotten, if he

The ultimate issue that should have been addressed in *Merrill* was whether or not there was a condition precedent to possession and enjoyment other than the natural expiration of the supporting life estates. No condition precedent or subsequent was expressed.¹⁵⁸ The only condition that might have been found to exist, thus causing a violation, would have been an implied condition of survivorship to the time of termination of the trust. Implication of the condition of survivorship to the time of distribution depended on the testator's intent as determined from the language read in light of various complex rules of construction.¹⁵⁹ Under the *Merrill* facts, several factors existed negating the implication of a survivorship condition: the absence of an alternative or a supplanting limitation, the gift of income to the future interest owners during the time preceding termination of the trust, and the lack of a word or phrase describing the beneficiaries as ones who must survive to a later date, such as "if living."¹⁶⁰ The existence of these negative factors, coupled with the commitment of Indiana courts to the earliest possible vesting of interests,¹⁶¹ makes it unlikely that a condition precedent of survivorship should have been implied in the *Merrill* trust provision. If no condition of survivorship to the time of trust termination were implied as a condition precedent to Judith's, Dennis', and their children's right to enjoy their share of the trust corpus, their interests would certainly vest well within the rule period.¹⁶²

In any event, it appears that no one argued the existence or nonexistence of a condition precedent in the *Merrill* case. It appears that a rule violation may have been conceded merely because of the possibility that the trust would terminate beyond the rule period, even though the time of trust termination is generally irrelevant to the rule-

is subsequently born." SIMES, *supra* note 119, § 127, at 267 (footnote omitted).

¹⁵⁸See *id.* §§ 11, 91.

¹⁵⁹The recent case of *Hinds v. McNair*, 413 N.E.2d 586 (Ind. Ct. App. 1980), extensively discussed the factors negating and affirming the existence of a condition of survival. For a discussion of this case, see Falender, *Decedents' Estates and Trusts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 175, 198-200 (1982).

¹⁶⁰453 N.E.2d at 358. The latter factor is particularly telling in light of the fact that in the same paragraph, in describing the takers of Walter's one-third share of the corpus, the testator expressed a clear condition of survivorship of his grandchildren to the time of termination. Thus, the testator obviously knew how to express a condition of survivorship. The absence of an express condition in certain parts of the same paragraph in which a condition is expressed is a strong indication that no condition was intended unless expressed. See *infra* note 162.

¹⁶¹See, e.g., *Chicago Indianapolis & Louisville Ry. v. Beisel*, 122 Ind. App. 448, 456, 106 N.E.2d 117, 121 (1952); *Busick v. Busick*, 65 Ind. App. 655, 670, 115 N.E. 1025, 1030, (1917), *transfer denied*, Nov. 16, 1917. But see generally SIMES, *supra* note 119, § 91 (noting criticism of the rule favoring a vested construction).

¹⁶²If a condition precedent of survivorship is implied, the children's interests would violate the rule. See *supra* notes 150-55 and accompanying text.

violation decision.¹⁶³ The distinction between vesting in interest, with which the rule is concerned, and vesting in possession, with which the rule is not concerned, may well be a common misunderstanding about the reach of the rule.

F. Recent Legislation

1. *Indiana Uniform Gifts to Minors Act.*—Indiana's version of the Uniform Gifts to Minors Act (IUGMA)¹⁶⁴ was revised to broaden the scope of allowable custodianship assets to include (1) proceeds of life or endowment insurance policies and annuity contracts, (2) beneficial interests in employee benefit plans, and (3) interests in land trusts.¹⁶⁵ Two additional changes were made to IUGMA. The first was made to correct an oversight in the original version which only allowed a nondonor custodian to resign and to appoint his successor by an instrument in writing. A donor custodian could only resign by petitioning a court to allow him to do so and to designate a successor custodian. A nondonor custodian could also resign in this manner.¹⁶⁶ Under the amendment, any custodian can now resign by executing an instrument in writing which sets forth the custodian's resignation and which designates a successor custodian. Alternatively, any custodian can execute an instrument of resignation which can then be filed with the court, together with a petition requesting the court to designate a successor custodian.¹⁶⁷ This amendment should substantially ease the process by which donor custodians can resign.

The second change made by the amendment was intended to allow donors to extend the date for paying custodial assets to a minor. The term "minor" in the statute now refers to a person under twenty-one years of age. The custodial term, however, must be designated by the donor and must terminate at an age not "less than eighteen (18) or

¹⁶³Walter's present life estate and the future interest in Walter's bodily issue are both clearly valid. The provision giving all or one-half of Walter's one-third to the decedent's "grandchildren, living at the time of the termination of said trust, share and share alike," imposes an express condition of survivorship to the time of termination. Probably the condition is precedent because the language of gift is so intimately tied to the survivorship phrase. See generally SIMES, *supra* note 119, § 91. If survival to the time of termination is required as a condition precedent to possession and enjoyment of the interest, the limitation to the grandchildren living at termination violates the rule. See *supra* notes 150-55 and accompanying text.

¹⁶⁴IND. CODE § 30-2-8-1 to -10 (1982), amended by IND. CODE §§ 30-2-8-1 to -10 (Supp. 1984).

¹⁶⁵Act of Mar. 8, 1984, Pub. L. No. 148-1984, Secs. 1-7, 1984 Ind. Acts 1278, 1278-89 (codified at IND. CODE §§ 30-2-8-1 to -10 (Supp. 1984)).

¹⁶⁶IND. CODE § 30-2-8-7 (1982), amended by IND. CODE § 30-2-8-7 (Supp. 1984).

¹⁶⁷Act of Mar. 8, 1984, Pub. L. No. 148-1984, Sec. 7, 1984 Ind. Acts 1278, 1288-89 (codified at IND. CODE § 30-2-8-7 (Supp. 1984)).

greater than twenty (20).”¹⁶⁸ If the donor makes no designation, the custodial term will end on the minor’s attainment of age eighteen.

The language “greater than twenty” in the statute is puzzling. It clearly does not allow the custodial term to extend to the minor’s attainment of age twenty-one, the age at which he ceases being a “minor” for purposes of the statute. The language may also not allow the term to extend until the minor attains age twenty since, at that point, he is actually “greater than twenty.” The longest term allowable under the statute, then, would end on the day before the minor attains age twenty. It is doubtful that this result was intended and this language should be clarified in the next legislative session.

2. *Disclaimers.*—Indiana’s disclaimer statute ¹⁶⁹ provided that a joint tenant could not disclaim any joint asset if the tenant furnished any of the consideration for the asset. In order to facilitate disclaimers by joint tenants, the legislature added language to the disclaimer statute which provides that a joint tenant is deemed *not* to have furnished any consideration for the tenant’s interest in a joint asset in the absence of clear and convincing evidence to the contrary.¹⁷⁰

This addition does not permit a broader range of disclaimers than under the unamended statute, but it does make a joint tenant’s disclaimer presumptively valid and, presumably, less subject to attack by taxing authorities. Other changes of a technical nature were also made to the disclaimer statute.¹⁷¹

3. *Summary Procedures in Small Estates.*—Indiana provides that small estates may be collected through a small estate affidavit procedure¹⁷² and distributed through a summary distribution procedure.¹⁷³ Under the former version, neither procedure was available if a decedent died owning real estate.

In an attempt to correct this deficiency, the legislature amended the summary distribution statute to incorporate a small estate affidavit procedure which would be available to pass title to real estate.¹⁷⁴ The statute, as amended, will not have much impact as the value of most real estate will exceed the dollar limitation set forth in the statute. This limitation

¹⁶⁸Act of Mar. 8, 1984, Pub. L. No. 148-1984, Sec. 2, 1984 Ind. Acts 1278, 1281-83 (codified at IND. CODE § 30-2-8-2 (Supp. 1984)).

¹⁶⁹IND. CODE §§ 32-3-2-1 to -15. (Supp. 1983), *amended by* IND. CODE §§ 32-3-2-1 to -15 (Supp. 1984).

¹⁷⁰Act of Feb. 24, 1984, Pub. L. No. 160-1984, Sec. 1 1984 Ind. Acts 1336, 1337 (codified at IND. CODE § 32-3-2-5 (Supp. 1984)).

¹⁷¹Act of Feb. 24, 1984, Pub. L. No. 160-1984, Secs. 1, 2, 1984 Ind. Acts 1336, 1337 (codified at IND. CODE §§ 32-3-2-5, -14 (Supp. 1984)).

¹⁷²IND. CODE § 29-1-8-1 (1982).

¹⁷³IND. CODE § 29-1-8-3 (1982), *amended by* IND. CODE § 29-1-8-3 (Supp. 1984).

¹⁷⁴Act of Feb. 29, 1984, Pub. L. No. 146-1984, Sec. 2, 1984 Ind. Acts 1274, 1275-76 (codified at IND. CODE § 29-1-8-3 (Supp. 1984)).

is based on the survivor's allowance, "if any," provided by Indiana Code section 29-1-4-1 (\$8,500) and the costs and expenses of administration and reasonable funeral expenses.¹⁷⁵

Even if a survivor's allowance were allowable, it would be only a very small, probably unimproved, or heavily mortgaged parcel of real estate that could be summarily distributed. If no survivor's allowance were available, the unencumbered value of the real estate could not exceed the costs and expenses of administration and reasonable funeral expenses, and the persons entitled to the estate's assets would be its creditors. To distribute real estate summarily under this procedure, each of the creditors would have to receive an undivided portion of the real estate. This may prove less than acceptable to the creditors and, it is likely that an estate would, despite this "simplified" procedure, sell the real estate rather than distribute it.

It should be noted that the summary distribution procedure will not always be available to protect a person distributing assets collected under the small estate affidavit procedure since that procedure allows the collection of assets by affidavit when the gross probate estate, less liens and encumbrances, does not exceed \$8,500.¹⁷⁶ As previously noted, the \$8,500 amount, which is equivalent to the survivor's allowance whether it is available to the estate or not, may not always be applicable under the summary distribution procedure.

4. *Trusts.*—The Indiana legislature incorporated a new section into Indiana's Trust Code which relieves a trustee, under certain conditions, from breaches of trust if the trust instrument incorporates a provision to that effect.¹⁷⁷ This provision will not relieve a trustee from liability for breaches of trust committed in bad faith, intentionally, or with reckless indifference to a beneficiary's interests, or from any liability for a breach profitable to the trustee. The trust provision will likewise not relieve the trustee from liability if the provision was incorporated into the trust agreement on account of the trustee's abuse of a fiduciary or confidential relationship.

By enacting this amendment, the legislature evidently intended to ease the administration of trusts by protecting trustees with respect to technical breaches of trust. The incorporation of such a provision in a trust should not be interpreted by trustees as a blank check for disregarding any of the substantive terms of a trust since such a breach would probably be regarded as "intentional" and, hence, not protected under the statute.

¹⁷⁵IND. CODE § 29-1-4-1 (1982).

¹⁷⁶IND. CODE § 29-1-8-1 (1982).

¹⁷⁷Act of Feb. 29, 1984, Pub. L. No. 149-1984, Sec. 1, 1984 Ind. Acts 1290, 1290 (codified at IND. CODE § 30-4-3-32 (Supp. 1984)).

5. *Constructive Trusts*.—Effective May 1, 1984, Indiana Code section 29-1-2-12 was repealed and replaced by Indiana Code section 29-1-2-12.1. This new section was enacted in direct response to the decision of the Indiana Court of Appeals in *Turner v. Estate of Turner*,¹⁷⁸ allowing a son who had shot and killed his parents to share nonetheless in their intestate estates. In *Turner*, the trial court had imposed a constructive trust on the property acquired by the son from his intestate parents, but the court of appeals reversed because the son had been found not responsible by reason of insanity in a criminal proceeding brought to determine his accountability for his parents' deaths.¹⁷⁹

The basis of the *Turner* court's decision is that one who does not, or cannot, intend that his acts result in death of his victim should not, in equity, be made a constructive trustee of property acquired from the victim.¹⁸⁰ The decision is definitely in accord with the overwhelming trend of cases in other jurisdictions.¹⁸¹ Equitable principles generally bar a person from profiting from wrongful conduct, but generally do not bar profit when there is no legal wrong. The finding of insanity by a criminal jury negates the legal wrongfulness of the insane person's conduct, and equity has no wrong to right.

¹⁷⁸454 N.E.2d 1247 (Ind. Ct. App. 1983), *transfer denied*, Mar. 14, 1984. The Indiana Supreme Court heard oral arguments in the case on March 8, 1984, but denied transfer on March 14, 1984, leaving the court of appeals decision intact. The author's similar, but more extensive, discussion of the *Turner* case and the new Indiana Code section 29-1-2-12.1 appears in G. HENRY, 2A HENRY'S PROBATE LAW & PRACTICE OF THE STATE OF INDIANA, ch. 25, § 13 (J. Grimes 7th ed. D. Falender Supp. 1984) [hereinafter cited as 2A HENRY'S].

¹⁷⁹454 N.E.2d at 1248. The court noted that three jury verdicts were available when the son was tried: guilty, not guilty, and not responsible by reason of insanity. *Id.* n. 5. The court also noted that the legislature had since added a verdict of guilty but mentally ill, but limited its holding to cases in which the not responsible verdict was rendered. 454 N.E.2d at 1248.

The trial court had also ordered that certain life insurance proceeds payable to the son be held in trust pending the outcome of the appeal; the court of appeals reversed this decision and ordered the proceeds paid to the son. *Id.* at 1252.

¹⁸⁰*Id.* at 1249.

¹⁸¹The *Turner* court reviewed cases from several jurisdictions, all of which allowed one who had been found not guilty by reason of insanity to share in the estate of the victim or to take insurance proceeds payable by reason of the death of the victim. *See, e.g.*, *Estate of Ladd*, 91 Cal. App. 3d 219, 224, 153 Cal. Rptr. 888, 892 (1979) (statute precluded inheritance only when the killing was unlawful and intentional); *Anderson v. Grasberg*, 247 Minn. 538, 546-47, 78 N.W.2d 450, 456 (1956) (An insane person "cannot fairly be said [to have] committed a wrong for which the law should upset the customary legal rights of property ownership."); *Simon v. Dibble*, 380 S.W.2d 898, 899 (Tex. Civ. App. 1964) (insane husband allowed to receive life insurance proceeds following acquittal for death of the insured wife). *See generally* Annot., 25 A.L.R. 4TH 787, 819-20, 863-68 (1983) (trend decidedly in favor of letting the insane killer share in the estate of the victim).

Indiana Code section 29-1-2-12 did not apply to mandate a constructive trust in the *Turner* case because the son had not been convicted of "intentionally causing the death of another, or of aiding or abetting therein."¹⁸² The statute would not, however, have precluded the court from imposing a constructive trust if the prevailing rules of equity, apart from the statute, had demanded it.¹⁸³ In *Turner*, as noted above, equitable principles did not call for a trust.

The *Turner* court invited the legislature to change the law if it found the resulting law "unpalatable,"¹⁸⁴ and the legislature accepted the invitation. The new section, 29-1-2-12.1, adds specific language in a new subsection (b) dealing with the precise fact situation in the *Turner* case. Subsections (a) and (c) essentially retain and rearrange much of the language of the former section, 29-1-2-12, adding a few new phrases and reworking a few of the former provision's phrases. The new section provides in full as follows:

(a) A person is a constructive trustee of any property that is acquired by him or that he is otherwise entitled to receive as a result of a decedent's death, if that person has been found guilty, or guilty but mentally ill, of murder, causing suicide, or voluntary manslaughter, because of the decedent's death. A verdict is conclusive in a subsequent civil action to have the person declared a constructive trustee.

(b) A civil action may be initiated to have a person declared a constructive trustee of property that is acquired by him, or that he is otherwise entitled to receive, as a result of a decedent's death, if:

(1) the person has been charged with murder, causing suicide, or voluntary manslaughter, because of the decedent's death; and

(2) the person has been found not responsible by reason of insanity at the time of the crime. If a civil action is initiated under this subsection, the court shall declare that the person is a constructive trustee of the property if by a preponderance of the evidence it is determined that the person killed or caused the suicide of the decedent.

¹⁸²454 N.E.2d at 1249 n.4. The *Turner* court quoted and applied the language quoted here, even though the killings and all other relevant events in the case occurred after the 1978 amendments had changed the statutory language to refer to a conviction of "murder, causing suicide, or voluntary manslaughter." Under either language, however, the result is the same. The key fact is that the son was not convicted of anything.

¹⁸³In *National City Bank of Evansville v. Bledsoe*, 237 Ind. 130, 141, 144 N.E.2d 710, 715 (1957), the Indiana Supreme Court stated that IND. CODE § 29-1-2-12 was intended to supplement, but not to supersede, general equitable principles. See also *Turner*, 454 N.E.2d at 1251-52 (discussing the *Bledsoe* case).

¹⁸⁴454 N.E.2d at 1252.

(c) If a constructive trust is established under this section, the property that is subject to the trust may be used only to benefit those persons, other than the constructive trustee, legally entitled to the property. However, if any property that the constructive trustee acquired as a result of the decedent's death has been sold to an innocent purchaser for value who acted in good faith, that property is no longer subject to the constructive trust, but the property received from the purchaser under the transaction becomes subject to the constructive trust.¹⁸⁵

Subsection (a) of the new section mandates a constructive trust if a "person has been found guilty, or guilty but mentally ill, of murder, causing suicide, or voluntary manslaughter, because of the decedent's death."¹⁸⁶ Assuming that these findings must be findings in a criminal proceeding,¹⁸⁷ subsection (a) does not apply to mandate a constructive trust unless a criminal proceeding has been completed and has resulted in a finding of guilty or guilty but mentally ill.

The new statute provides, in subsection (a), that "[a] verdict is conclusive in a subsequent civil action to have the person declared a constructive trustee."¹⁸⁸ Certainly, a verdict of guilty or guilty but mentally ill is conclusive in the civil constructive trust action under this new language, since those verdicts are expressly referred to in a prior sentence in the same subsection. Is a verdict of not guilty also conclusive? If it is conclusive, a verdict of not guilty would preclude establishment of a constructive trust. Similarly, is a verdict of guilty of an offense other than one of the listed offenses conclusive to avoid establishment of a constructive trust? In other words, does the statutory language, "A verdict is conclusive," apply to render any verdict conclusive, or is it intended to render conclusive only the two verdicts specifically mentioned in the section in which the language appears? It is hoped that the new statute is not intended to mandate total dependence on the criminal process, such that all verdicts are conclusive.¹⁸⁹ Such dependence would be an unfortunate and undue restriction on the power and flexibility of courts of equity to impose a constructive trust when the equities demand it.

¹⁸⁵IND. CODE § 29-1-2-12.1 (Supp. 1984).

¹⁸⁶*Id.* § 29-1-2-12.1(a).

¹⁸⁷See 2A HENRY'S, *supra* note 178, ch. 25, § 13 (Supp. 1984).

¹⁸⁸IND. CODE § 29-1-1-12.1(a) (Supp. 1984). The former statute provided, "Such conviction shall be conclusive in any subsequent suit to charge him as such constructive trustee." IND. CODE § 29-1-2-12 (1982), *repealed by* Act of Mar. 1, 1984, Pub. L. No. 147-1984, Sec. 2, 1984 Ind. Acts 1277, 1278. The word "such" provided a definite reference back to prior language in the statute, referring to a conviction of murder, causing suicide, or voluntary manslaughter. Thus, a conviction of one of the three listed offenses was conclusive, but nothing else was by statute rendered conclusive.

¹⁸⁹See 2A HENRY'S, *supra* note 178, ch. 25, § 13 (Supp. 1984) (further discussing *Turner*).

Subsection (b) of the new statute responds directly and specifically to the *Turner* case by providing that a civil action may be initiated to establish a constructive trusteeship if a person has been charged with one of the listed offenses and "has been found not responsible by reason of insanity at the time of the crime."¹⁹⁰ The subsection then mandates a constructive trust if, in the civil action, "by a preponderance of the evidence it is determined that the person killed or caused the suicide of the decedent."¹⁹¹ Thus, the son in *Turner* would have been a constructive trustee if the new statute had applied, in spite of the son's insanity at the time of the killing.

A legislative intent question arises here. Is subsection (b) intended to be an exhaustive description of the times when a civil action may be initiated in homicide cases to have a person declared a constructive trustee? By enacting a statute permitting a civil action ("may be initiated") if two very specific requirements are met ("charged with" one of the listed offenses, and "found not responsible"), the legislature implies that if the two very specific requirements are not met, the civil action may not be initiated. *Inclusio unius est exclusio alterius*. If subsection (b) is intended as a description of the only times when a civil action for a constructive trust may be initiated, subsection (b) would operate as a narrowing of the power and flexibility of the courts of equity to determine whether the facts are ripe to right a wrong.¹⁹² In light of the statute's history and purpose, the construction that leaves to the courts their former broad power to impose a trust apart from the statute is probably the construction that best tracks the legislative intent.¹⁹³ Thus, a nonexclusive construction of subsection (b) seems called for.

¹⁹⁰IND. CODE § 29-1-12.1(b)(2) (Supp. 1984).

¹⁹¹*Id.*

¹⁹²A court of equity, unless restrained by a restrictive construction of subsection (b), could impose a constructive trust based on a civil finding of appropriate wrongdoing, regardless of whether a person was charged in a criminal action and regardless of the verdict in the criminal action. The Supreme Court of Indiana so stated in dicta in *National City Bank of Evansville v. Bledsoe*, 237 Ind. 130, 141-42, 144 N.E.2d 710, 713 (1957):

[T]he murderer should be precluded from taking the property if it is established in the civil proceeding that he committed the murder even though he has not been convicted in a criminal proceeding; either because he committed suicide before he was tried, or because the criminal proceeding has not been completed, or even because he has been acquitted in the criminal proceeding.

Id. (footnote omitted).

¹⁹³There is no indication that the legislative intent in enacting IND. CODE § 29-1-12.1 (Supp. 1984) was to limit *National City Bank of Evansville v. Bledsoe*, 237 Ind. 130, 144 N.E.2d 710 (1957), or to limit the power of equity generally. In fact, all indications of legislative intent point to broadening of the power of the courts to impose constructive trusts. The *Turner* case raised a concern because ultimately, after appeal, no constructive trust was imposed even though the son most certainly had shot and killed his parents. The legislature acted in order to correct the *Turner* result and to assure that a constructive trust

Subsections (a) and (b) contain the following language describing the property over which the constructive trust is established: "any property that is acquired by [the killer] or that he is otherwise entitled to receive as a result of [the] decedent's death."¹⁹⁴ This new language is different from corresponding language in the previous two versions of the statute, one of which called for a constructive trust on "property . . . acquired . . . because of such death" of the decedent,¹⁹⁵ and the other of which called for constructive trust on "property acquired . . . because of the offense."¹⁹⁶

The new language, like the former language, certainly encompasses interests acquired by will or by intestate succession and interests acquired by law at the decedent's death, such as the statutory survivor's allowance or the statutory elective share. The new language, unlike the former language, also certainly encompasses life insurance proceeds and similar pay-on-death contractual arrangements, such as annuities, pension payments, or retirement accounts with deathtime payments.¹⁹⁷ The new language, unlike the former language, arguably covers some part of the interest of the survivor of a tenancy by the entireties, some part of any jointly owned survivorship interest, and some part of the interest of a remainderman-killer following the life estate of the victim.¹⁹⁸

Subsection (c) of the new statute rewords and clarifies former language protecting bona fide purchasers of the constructive trustee. Subsection (c) also restates the former provision that the constructive trust may benefit only "those persons, other than the constructive trustee, legally entitled to the property."¹⁹⁹ As formerly, the constructive trustee is not statutorily deemed to predecease the victim. Thus, if *C*¹ kills *T*,

would be imposed under the *Turner* facts in the future.

¹⁹⁴IND. CODE § 29-1-2-12.1(a) (Supp. 1984). Except for minor differences, *id.* § 29-1-2-12.1(b) contains the same language.

¹⁹⁵IND. CODE § 29-1-2-12 (1976), *repealed by* Act of Mar. 1, 1984, Pub. L. No. 147-1984, Sec. 2, 1984 Ind. Acts 1277, 1278.

¹⁹⁶IND. CODE § 29-1-2-12 (1982), *repealed by* Act of Mar. 1, 1984, Pub. L. No. 147-1984, Sec. 2, 1984 Ind. Acts 1277, 1278.

¹⁹⁷The former language, "acquired because of the offense," did not so clearly cover life insurance proceeds or other pay-on-death contractual arrangements. Under the former language, it might have been argued that the beneficiary's rights under an inter vivos contractual arrangement were acquired by reason of the inter vivos contracts, and the death of the insured with the policy in force merely satisfied a condition precedent to the receipt of benefits acquired before death. Use of the word "received" makes it easier to conclude that the proceeds of such contractual arrangements are now intended to be covered by the statute.

Although IND. CODE § 29-1-2-12.1 appears in the chapter of the Probate Code entitled Intestate Succession, the broad language of the section shows that it is clearly not intended to be limited to intestate succession property.

¹⁹⁸See 2A HENRY's, *supra* note 178, ch. 25, § 13 (Supp. 1984).

¹⁹⁹IND. CODE § 29-1-2-12.1(c) (Supp. 1984).

and *T* dies intestate survived by children *C*¹ and *C*², and by *C*¹'s child *GC*¹, *C*¹ will hold as a constructive trustee for *C*² only. *GC*¹ will not be legally entitled to any portion of *T*'s intestate estate; *GC*¹ is not an heir of *T* since he is excluded by his ancestor *C*¹.²⁰⁰

²⁰⁰See generally 2A HENRY's, *supra* note 178, ch. 25, § 13, at 118-19 (7th ed. 1978); *id.* (Supp. 1984). Since the constructive trustee is not statutorily deemed to predecease the victim, the antilapse statute will not apply to save a devise for descendants of the constructive trustee. Nor will a will provision necessarily apply if it makes a gift to a substitute taker in the event the constructive trustee (devisee) predeceases the testator.

XVI. Workers' Compensation

G. TERRENCE CORIDEN*

A. *Compensability of Claims*

Indiana Code section 22-3-2-2 provides compensation to an employee "for personal injury or death by accident arising out of and in the course of employment."¹ Within the last year, the courts have addressed the scope of the statutory language of "arising out of," "in the course of," and "by accident."

1. *Arising Out Of and In the Course Of*.—In *Clem v. Steveco, Inc.*,² the plaintiff filed a suit in civil court asking for compensation and punitive damages not only against his deceased wife's employer, but also against the franchisor of the company for which she worked. The trial court granted the defendant's motion to dismiss. In assuming the facts most favorable to the employer, the court of appeals found that the employee-decedent was a night clerk at a convenience store owned by Steveco, Inc. under a franchise arrangement with the franchisor, Southland Corporation. During the decedent's employment, the store was robbed, and the decedent was abducted and murdered. The allegations in the complaint were based on the failure of the franchisor to provide a reasonably safe place for the employee to work.³

In upholding the trial court's dismissal of Steveco, Judge Shields held that the murder of an employee is an act that may arise out of and in the course and scope of the employment, depending upon the facts of the particular case. In the case at bar, the injury or death of the employee was one which might be reasonably anticipated by the employee in view of the fact that the employee's duties included guarding the cash register from theft by third parties.⁴ Thus, the employee's death arose out of and in the course of her employment.

The court reversed, however, the trial court's dismissal as to the franchisor, stating that the degree of control or direction the franchisor had over the employee would determine whether or not the plaintiff was entitled to a civil remedy rather than the benefits arising under the Workmen's Compensation Act.⁵

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¹IND. CODE § 22-3-2-2 (1982).

²450 N.E.2d 550 (Ind. Ct. App. 1983).

³*Id.* at 551.

⁴*Id.* at 553.

⁵*Id.* at 555-56. It should be noted that the plaintiff-husband attempted to circumvent the Workmen's Compensation Act by asserting that the Act, as applied to him, was unconstitutional. The plaintiff argued that the Act's provisions made a wife a presumptive

In *Blade v. Anaconda Aluminum Co.*,⁶ the complaint alleged that the plaintiff's decedent was an employee of the defendant, and that an explosion which killed the decedent was caused by the defendant's intentional failure and refusal to take certain precautionary safety measures for its employees. The court of appeals affirmed the trial court's ruling, and held that the plaintiff's exclusive remedy was under the Workmen's Compensation Act and not in a civil suit against the employer.⁷ This was so even though all reasonable inferences of the plaintiff's complaint supported the theory that the employer was guilty of grossly negligent and wanton behavior which caused the decedent's death.⁸

In drawing a fine line between intentional conduct which eventually results in the death of an employee and conduct which is intended to cause the death of an employee, the court approvingly cited the reasoning of *Cunningham v. Aluminum Co. of America*:⁹

"[T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid, and becomes a certainty."¹⁰

Thus, even if the employer's conduct is grossly negligent or wanton, the employee's remedies are restricted to those of the Workmen's Compensation Act.

In a case similar to *Blade*, the court of appeals in *Skinner v. Martin*¹¹

dependent and obligated the husband to prove that he was a presumptive dependent of the wife. See IND. CODE § 22-3-3-19 (1982). The plaintiff claimed that the evidentiary presumptions "impermissibly discriminate[d] on a gender basis between similarly situated persons." 450 N.E.2d at 552. The appellate court avoided the issue by holding that even if the provision were unconstitutional based upon sex discrimination, the entire Act would not be declared null and void, but only that portion of the Act dealing with the presumptive dependency and who has the burden of proving that dependency. *Id.* at 553. Certainly the exclusive remedies of the Act would not be affected by the allegations of unconstitutionality. For a more complete discussion of the constitutional issues involved in a related case, see Macey, *Constitutional Law, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 129, 144-45 (1985) (later decision, discussed under the name *Portman v. Steveco, Inc.*).

⁶452 N.E.2d 1036 (Ind. Ct. App. 1983).

⁷*Id.* at 1038.

⁸*Id.*

⁹417 N.E.2d 1186 (Ind. Ct. App. 1981).

¹⁰*Id.* at 1190 (quoting W. PROSSER, *THE LAW OF TORTS* § 8 (4th ed. 1971)).

¹¹455 N.E.2d 1168 (Ind. Ct. App. 1983).

affirmed the trial court's sustaining of the defendant's motion to dismiss the employee's complaint against a fellow employee based upon that fellow employee-defendant's intentional tort. In this case, Skinner was on a coffee break when Martin approached him and requested that Skinner perform certain acts at his work area. Skinner replied that he would do so after he finished his coffee break. Martin responded by commenting on the work habits of Skinner. After a conversation filled with expletives, Martin struck Skinner on the jaw causing injury. Skinner thereafter filed for benefits under the Workmen's Compensation Act and also brought a civil suit against Martin for damages.¹²

In dismissing the Skinner suit, the court held that the actions of the fellow employee arose out of and in the course of employment. The court reasoned that the coffee break was an act incidental to the employment and, thus, was in the course of the employment. The court further reasoned that the request made by Martin of Skinner to perform certain acts was related to the work and, hence, arose out of the employment contract. Since the words and conduct of the parties were not exclusively personal, but concerned the duties of the parties, the court found that the actions arose out of the employment.¹³ Moreover, the court held that Skinner was precluded from alleging that the injuries did not arise out of or in the course of the employment due to the fact that Skinner had applied for and received compensation under the Workmen's Compensation Act.¹⁴ Thus, the dismissal was based on the common law principle that one may not file suit against his fellow servant, which has been codified in Indiana.¹⁵

The court of appeals in *Donahue v. Youngstown Sheet & Tube Co.*¹⁶ addressed the problem as to what point in time the employee's activities terminate and his personal activities begin, either when going to or departing from the place of employment. The Youngstown Sheet & Tube Company's complex where Donahue was employed encompassed buildings, bridges, roads, and factories throughout a multiblock area. Bordering the facility were two public roads known as Dickey and Riley.¹⁷

Donahue worked in the pipe mill cafeteria. A clockhouse at the pipe mill gate was designated for employees of the pipe mill; however, Donahue chose to clock out at the tin mill gate. The tin mill gate was located on Dickey Road, with Youngstown Steel plants on each side. Traffic control signals, under the exclusive control and maintenance of the defendant, regulated travel by cars along the road and controlled

¹²*Id.* at 1169.

¹³*Id.* at 1170.

¹⁴*Id.* at 1171.

¹⁵See IND. CODE § 22-3-2-6 (1982).

¹⁶456 N.E.2d 751 (Ind. Ct. App. 1983).

¹⁷*Id.* at 753.

movement by pedestrians to and from the plants on both sides of the road.¹⁸ After Donahue finished her regularly scheduled duties at approximately 10:30 p.m., she walked to her vehicle, drove it onto Dickey Road, and parked on Dickey Road across from the tin mill clockhouse. After clocking out, she started across Dickey Road and was struck by a vehicle driven by a nonfellow employee.¹⁹ The Industrial Board, on a divided vote, found against the plaintiff on the basis that her injuries did not result from an accident arising out of and in the course of her employment as a cafeteria employee.²⁰

In reversing the Industrial Board, Judge Robertson reasoned that the act of clocking out was incidental to Donahue's employment and, thus, arose out of and was in the course of her employment.²¹ This reasoning was supported by several facts. Despite the presence of a clockhouse at the pipe mill, Donahue, along with other employees, customarily clocked out at the tin mill clockhouse. Moreover, the supervisor, who had knowledge of such activities, did not attempt to restrict these actions. In addition, Youngstown exercised exclusive control over the traffic signals.²²

Finally, Judge Robertson determined that the situs of the accident had a bearing on the majority's decision. Because Donahue was supposed to park her automobile in a lot connecting Riley Road, the employer should have anticipated that she would have entered her automobile, driven down Riley Road to Dickey Road and down to the clockhouse, especially in view of the lateness of the hour. This procedure would have been more likely than her walking to the other clockhouse, which would have taken her away from the parking lot where her automobile was parked and, therefore, would have prolonged her walking in the late evening hours. The court found it was immaterial that the accident itself occurred on a public road rather than on the premises owned by Youngstown, since Youngstown exerted some control over the intersection.²³

In a concurring opinion, Judge Neal noted that although Dickey Road is a public road, "[i]n reality, Dickey Place is one of the interior roads used by the plant, and persons doing business there, as an internal route of communication and transportation."²⁴ The fact that Donahue chose one place to clock out as opposed to another was of no relevance since fault is usually not grounds for disqualification under the Workmen's Compensation Act.²⁵

¹⁸*Id.* at 754.

¹⁹*Id.* at 753.

²⁰*Id.* at 751-52.

²¹*Id.* at 755.

²²*Id.*

²³*Id.* at 756.

²⁴*Id.* (Neal, J., concurring).

²⁵*Id.* at 757.

Judge Ratliff, dissenting, did not disagree with the majority's reasoning or the conclusion reached therein, but would have affirmed the Industrial Board for the sole reason that, in his opinion, the issue of whether an accident arose in the course of employment was a question of fact for the trier of fact and not a question of law.²⁶ Thus, if there were factors supporting the Industrial Board's conclusions, the Board's decision should be undisturbed. Judge Ratliff believed such facts existed which supported the Industrial Board's ruling that the injury did not arise out of the course of employment, and that decision should have remained undisturbed.²⁷

2. *By Accident*.—What constitutes an accident in order to qualify an employee for benefits within the context of the Workmen's Compensation Act was addressed in *Young v. Smalley's Chicken Villa, Inc.*²⁸ Douglas Young's duties as an employee included twisting and bending in order to pick up and deposit chickens in deep fryers. After spending several hours performing these duties, Young bent over to pick up a several of pieces of chicken and immediately felt severe pain in his lower back. Subsequent medical examination disclosed that Young suffered a herniated disc. The sole issue on appeal was whether or not the act of bending over to pick up the chicken, which was the employee's customary duty and was unaccompanied by any sudden twisting, turning, or other trauma, was an accident within the meaning of the Indiana Workmen's Compensation Act.²⁹

The court of appeals applied the unexpected result theory³⁰ and sustained the Industrial Board in denying benefits.³¹ The unexpected result theory is similar to the unexpected cause³² and unexpected event theories.³³ In applying this rule, the court noted that nothing the employee

²⁶*Id.* (Ratliff, J., dissenting).

²⁷*Id.* at 757-58.

²⁸458 N.E.2d 686 (Ind. Ct. App. 1984).

²⁹*Id.* at 687.

³⁰*Id.* The court defined the unexpected result theory as when an accident occurs "where everything preceding the injury was normal, and only the injury itself was unexpected, e.g., where a worker bends over, stoops, turns, lifts something, etc., which activity is part of his everyday work duties, and yet, . . . he is unexpectedly injured." *Id.* (quoting *Ellis v. Hubbell Metals, Inc.*, 174 Ind. App. 86, 93, 366 N.E.2d 207, 212 (1977), *transfer denied*, May 16, 1978). The court noted, however, that the Indiana Supreme Court has ruled that there must be "an unlooked for mishap or untoward event not expected or designed." 458 N.E.2d at 687 (quoting *Calhoun v. Hillenbrand Indus., Inc.*, 269 Ind. 507, 511, 381 N.E.2d 1242, 1244 (1978)).

³¹458 N.E.2d at 688.

³²The court defined the unexpected cause theory as where "an 'accident' cannot occur in the absence of some kind of increased risk or hazard, e.g., a fall, slip, trip, unusual exertion, malfunction of machine, break, collision" *Id.* at 687 (quoting *Ellis v. Hubbell Metals, Inc.*, 174 Ind. App. 86, 93, 366 N.E.2d 207, 211 (1977), *transfer denied*, May 16, 1978).

³³The court noted that the unexpected event theory of an accident is a broad term which is defined by the unexpected cause and unexpected result theories. 458 N.E.2d at

did on that day was out of the ordinary and that, despite no unexpected event or cause, the employee had suffered a herniated disc. Such an injury without unexpected trauma or unexpected events is not compensable. The employee must show something other than the fact that he was injured while at his place of employment.³⁴

In a concurring opinion, Judge Neal assailed the legislature for the poor choice of words "by accident."³⁵ In his opinion, the unexpected nature of the injury is irrelevant, and the focus should be elsewhere: "A worker should be compensated for injuries which are an intrinsic and predictable hazard of the employment and disability induced over a course of time as well as injuries which are 'unlooked for mishap or untoward event not expected or designed.'"³⁶ Thus, there might be some suggestion to the legislature to alter or delete the words "by accident."

In *Holloway v. Madison-Grant United School Corp.*,³⁷ the court of appeals sustained the Industrial Board's denial of Workmen's Compensation benefits to an assistant superintendent of the defendant's school system who died of a heart attack suffered during a hotly contested and controversial school board meeting. Although the court denied the claim, it did so only because the Industrial Board had ruled against the claimant. The court noted that the standard of review of Industrial Board decisions is not one of reweighing the evidence, but simply one of determining whether or not there were sufficient facts upon which the Board could have reached the ultimate conclusion of fact.³⁸

The opinion demonstrates the difficulties inherent in proving that a heart attack is causally connected to one's employment when no trauma or other external injury is connected with the heart attack, especially when the victim has a substantial arteriosclerotic condition. The court noted that it is not necessary that the claimant prove some unusual exertion or sudden shock in order to connect his heart attack with the employment.³⁹ The court stated that a nonphysical, psychological, mental, or emotional stimulus associated with unusual events or happenings within the work environment could in and of itself be the cause of the heart attack, satisfying the requirements of "accident" within the meaning of the statute.⁴⁰ The court also noted that "where the triggering event is not so colorful and the contribution of stress from employment is of a more protracted nature, such as worry, overwork, frustration, or

687 (citing *Ellis v. Hubbell Metals, Inc.*, 174 Ind. App. 86, 93, 366 N.E.2d 207, 211 (1977), *transfer denied*, May 16, 1978).

³⁴458 N.E.2d at 688.

³⁵*Id.* (Neal, J., concurring).

³⁶*Id.* at 689.

³⁷448 N.E.2d 27 (Ind. Ct. App. 1983).

³⁸*Id.* at 31.

³⁹*Id.* at 30.

⁴⁰*Id.* (quoting *Harris v. Rainsoft of Allen County, Inc.*, 416 N.E.2d 1320, 1323 (Ind. Ct. App. 1981)).

tension, the question becomes a closer one . . . and must be left to the trier of fact.”⁴¹

B. Benefits Derived from Compensable Claims

Under Indiana law, an employer is obligated to furnish medical services to his employee for a work-related injury.⁴² In the event the employee selects his own physician without the prior approval of the employer, the question arises as to whether or not the employer is obligated to pay for medical services.

In *Richmond State Hospital v. Waldren*,⁴³ the court of appeals, in a very limited holding, stated that “when the employer has no knowledge of the need for medical services and no opportunity to tender the medical services and when no emergency or other good cause is shown, he cannot be held liable for them.”⁴⁴ In *Richmond*, the plaintiff sought the services of her own physician in addition to the physicians supplied by the hospital. Upon her personally chosen physician’s recommendation, she entered the hospital and was treated for phlebitis. The defendant admitted that the plaintiff had suffered an injury to her right ankle in May of 1979, but denied that the phlebitis condition for which she was being treated was causally connected to the original accident.⁴⁵ The court noted that under the applicable statute, the employee may “select medical treatment under three circumstances: (1) in an emergency; (2) if the employer fails to provide needed medical care; or (3) for other good reason. Because the claimant bears the burden of proving facts necessary to establish her claim, Waldren bore the burden to prove that one of these circumstances existed.”⁴⁶ Although the Hearing Officer found that the plaintiff had good cause to seek medical treatment from her physician, the court reversed, noting that the fact supporting such cause was not stated within the award.⁴⁷

In *Wanatah Trucking v. Baert*⁴⁸ the court held that an award for permanent total disability survives the death of the employee and inures to the benefit of his dependents, even when the death is not causally

⁴¹448 N.E.2d at 31 (citation omitted).

⁴²See IND. CODE § 22-3-3-4 (1982).

⁴³446 N.E.2d 1333 (Ind. Ct. App. 1983).

⁴⁴*Id.* at 1336.

⁴⁵*Id.* at 1334.

⁴⁶*Id.* at 1336 (citation omitted).

⁴⁷*Id.* It should be noted that the Hearing Officer and this author are one and the same person. The good cause for the plaintiff seeking her own medical treatment was the fact that the employer had taken the position that the phlebitis condition was not work-related and, therefore, he was not obligated to pay for the treatment. Thus, any prior notice or request to the employer to provide medical treatment would have been a futile act and, as such, the plaintiff should not have had to notify the defendant of her actions.

⁴⁸448 N.E.2d 48 (Ind. Ct. App. 1983).

connected to his employment.⁴⁹ The court noted that Workmen's Compensation benefits are generally paid for one of two different reasons: that the employee is entitled to wages he has lost pursuant to an earning impairment theory, or that the employee is entitled to compensation for a physical injury pursuant to a physical impairment theory.⁵⁰ The court reasoned that when the injury has become permanent, the theory for payment of compensation is pursuant to the physical impairment theory; thus, compensation due and owing to the claimant for any type of permanent injury or permanent loss of physical function survives the life of the employee.⁵¹

In *Freel v. Foster Forbes Glass Co.*,⁵² the court, in a landmark Indiana decision, permitted a defendant-employer to take credit for payments made due to an employee's injury even though the payments were not mandated by an Industrial Board award nor temporary total disability benefits, but were simply payments made by the employer under the terms of a union contract between the defendant and the employee's union. The defendant and the union had entered into a contract whereby the employees would receive 100% of their wages if the employee was sick or injured for any reason, work-related or other.⁵³

In *Freel*, the plaintiff suffered an injury arising out of and in the course of his employment; the defendant then commenced payments pursuant to its wage continuation plan. Under the terms of the plan, the defendant paid the employee approximately \$15,000. After the employee returned to work, he filed an application for benefits, including those for temporary total disability. The Industrial Board found that the claimant was entitled to approximately \$6,000 in benefits, but gave the employer full credit for the \$15,000 paid, thus finding that the employee was not entitled to any further benefits.⁵⁴ The employer did not have workmen's compensation insurance, but was self-insured and had complied with the statute in becoming self-insured. The employer, however, had failed to submit the wage continuation plan to the Industrial Board for approval pursuant to Indiana Code section 22-3-5-4. The court noted that under this code section the employer was obligated only to file its self-insured status; it was not required to file a substitute system of payment for temporary total disability benefits.⁵⁵

The rationale of the decision is simply that an employee should not be entitled to a double recovery for a single injury. Assuming the wage

⁴⁹*Id.* at 53.

⁵⁰*Id.*

⁵¹*Id.*

⁵²449 N.E.2d 1148 (Ind. Ct. App. 1983).

⁵³*Id.* at 1149.

⁵⁴*Id.* at 1150.

⁵⁵*Id.* at 1152.

continuation plan was to compensate the employee for the time that he was disabled from work and not for any physical impairment, the credit to the employer should be in terms of weeks and not in terms of monies paid. Therefore, the credit should not be against any impairment that the employee may have suffered. This would be in accord with the physical impairment theory enunciated in *Wanatah*,⁵⁶ and is in accord with the wage continuation plan, which obligated the employer to pay for the benefits while the employee was off work and not for any other period.

C. Jurisdiction of Industrial Board Cases

In *Overshiner v. Indiana State Highway Commission*,⁵⁷ the court held that the assignment of error, which must be filed with the court of appeals in order to invoke the jurisdiction of that court,⁵⁸ need not be filed until such time as the record is filed.⁵⁹ Thus, when a plaintiff files a petition for extension of time to file the record, he impliedly requests an extension of time for the assignment of error to be filed.⁶⁰ The court noted that such a rule is reasonable in light of the fact that the assignment of error in an Industrial Board case is not similar to the motion to correct errors in a civil case.⁶¹ In the civil courts, the motion to correct errors is for the benefit of the trial court as well as the benefit of the appellate court. In an Industrial Board case, however, the assignment of error is solely for the benefit of the appellate court.⁶²

D. Statute of Limitations Affecting the Filing of Claims

In *Overshiner*, the court also held that the claimant must file his Form 14 application for a change or modification of an award within two years from the last date for which compensation was paid under an award made either by agreement or upon hearing, or within one year if such request is for an increase of permanent partial impairment benefits.⁶³ This is in accord with provisions of Indiana Code section 22-3-3-27.⁶⁴

⁵⁶See *supra* notes 48-51 and accompanying text.

⁵⁷448 N.E.2d 1245 (Ind. Ct. App. 1983).

⁵⁸See IND. CODE § 22-3-4-8 (1982).

⁵⁹448 N.E.2d at 1247.

⁶⁰*Id.* at 1246.

⁶¹*Id.* at 1247.

⁶²*Id.*

⁶³*Id.* at 1248-49.

⁶⁴This code section provides:

The power and jurisdiction of the industrial board over each case shall be continuing and from time to time, it may, upon its own motion or upon the application of either party, on account of a change in conditions, make such modification or change in the award, ending, lessening, continuing or extending

In *Overshiner*, the claimant and the employer had entered into a Form 12 agreement which had been approved by the Industrial Board. The agreement then became an award obligating the defendant-employer to pay compensation benefits beginning on January 14, 1975, and the defendant was to continue such payments until terminated in accordance with the Workmen's Compensation Act. The defendant stopped making payments on August 4, 1977, and the Form 14 application for modification of the award was not filed until January 9, 1981, almost three and one-half years after the last date compensation was paid.⁶⁵

The court noted that the statute ran two years from the date compensation was last paid even though the employer did not attempt to enter into settlement negotiations with the claimant. Thus, the court held that the statute of limitations barred the plaintiff's claim, since he did not offer any legally recognized justification for the three and one-half year delay.⁶⁶

the payments previously awarded, either by agreement or upon hearing, as it may deem just, subject to the maximum and minimum provided for in this act.

Upon making any such change, the board shall immediately send to each of the parties a copy of the modified award. No such modification shall affect the previous award as to any money paid thereunder.

The board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after the expiration of two (2) years from the last day for which compensation was paid under the original award made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the last day for which compensation was paid. The board may at any time correct any clerical error in any finding or award.

IND. CODE § 22-3-3-27 (1982).

⁶⁵448 N.E.2d at 1247-48.

⁶⁶*Id.* at 1249.

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